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Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY

Supreme Court of the United States.

October Term, 1932.

No. 228.

George A. Ohl & Company,
Petitioner,

v.

A. L. Smith Iron Works,
Respondent.

No. 229.

Same v. Same.

Brief for Petitioner on Writs of Certiorari to the Circuit Court of Appeals for the First Circuit.

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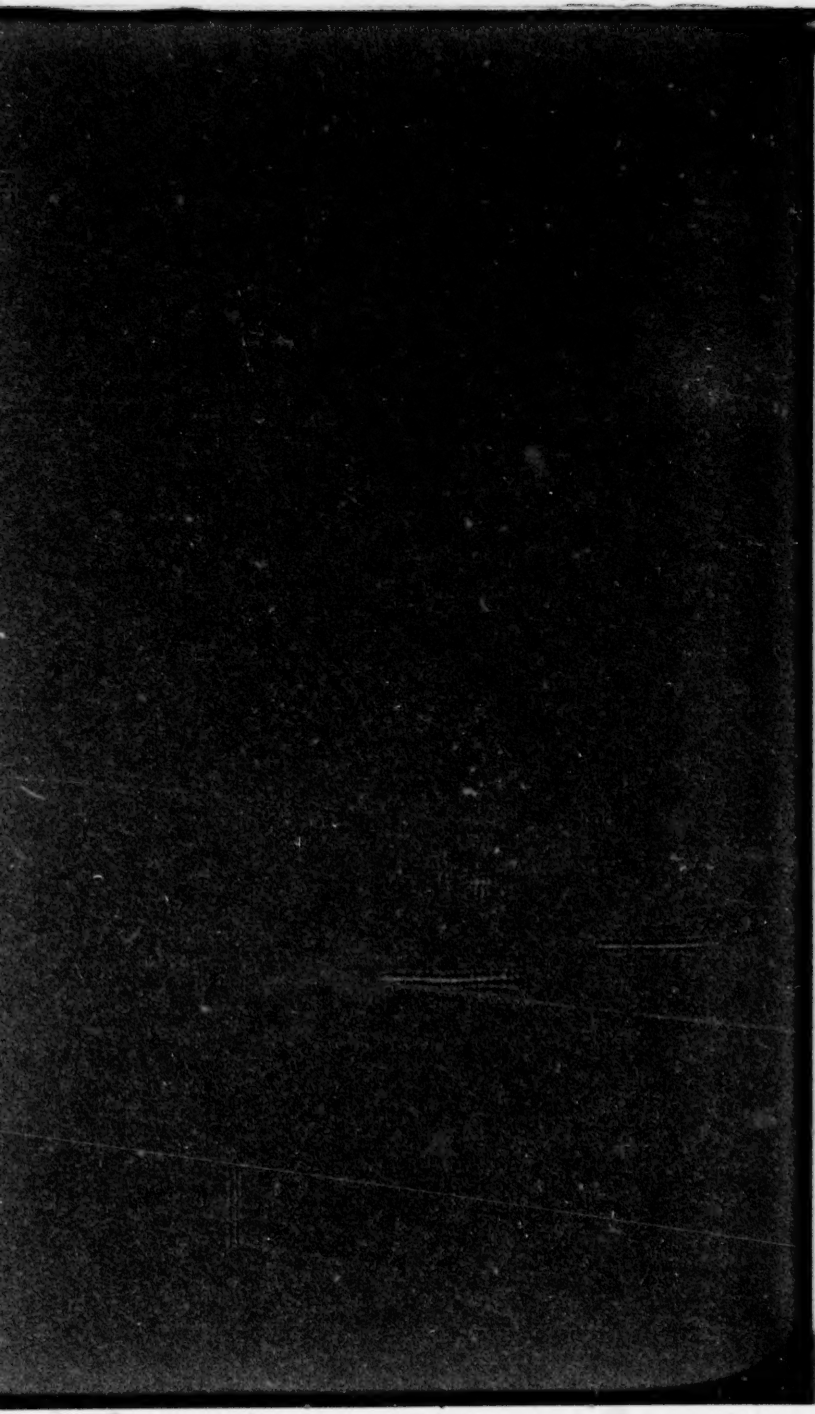

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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY, PETITIONER,

v.

A. L. SMITH IRON WORKS, RESPONDENT.

No. 229.

SAME *v.* SAME.

Petitioner's Brief on Writs of Certiorari to the Circuit Court of Appeals for the First Circuit.

We have divided our brief into two divisions. The first dealing with the technical questions of the allowance of the bills of exceptions. The second with the merits of the exceptions.

Part One.

Statement of the Technical Issues Raised and Errors Assigned.

After a jury trial in the District Court for the District of Massachusetts, the petitioner presented bills of exceptions in due form and within a proper time to the district judge for allowance. The bills were assented to. The trial judge wrote at the end of the bills of exceptions: "Allowed, August 20, 1930.

J. A. L.

D. J."

(R. 223, 226, 238, 239.)

He followed a long-established practice at least tacitly approved and not before criticized by the Circuit Court of Appeals for the First Circuit (Clerk's Certificate, p. 8 of petition herein). That practice was first challenged by this respondent just before argument, practically nine months after appeals in these cases had been entered.* Because of the form of the signature of the district judge on the bill of exceptions the Circuit Court of Appeals, not as a matter of discretion, but because of its ideas of the limitations of its power, refused to consider the merits of the appeal, refused to treat the defect as amended, refused opportunity for amendment and affirmed the District Court judgments (R. 268).

57 F. (2d) 44.

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*This point would probably not have arisen if respondent's counsel, after having assented to the bills of exceptions, shortly before oral argument in its brief for the first time had not questioned the sufficiency of Judge Lowell's signatures to these bills. Neither then nor later did they file or present any formal motion to that issue.

The claimed defect coming to your petitioner's actual knowledge for the first time just before argument in the Circuit Court of Appeals, your petitioner sought and believed it had in the limited time available found an answer to that issue under the statutes and authorities which it cited in a supplemental brief filed at the opening of its oral argument. Your petitioner first brought the question to the actual attention of the Circuit Court at the opening of its oral argument, defined the issue, stated that counsel thought his supplemental brief cited authorities enabling the Circuit Court to dispose of the issue in these cases, but asked that if the question became of moment he might further be heard and take such proceedings as might lie to cure any error.

The presiding judge, to counsel's statement that the issue turned on the fact that Judge Lowell had signed the bills of exceptions with his initials only, asked, in substance, "What difference does that make?" to which counsel replied in substance:

> "There is an old case in 125 U. S. where the Supreme Court said it did make a difference and while I feel my supplemental brief points out authorities which in this case enables this Court to deal with these bills on their merits I would like in case the Court does not agree with my ideas permission to be heard and to file such proceedings as may be necessary to cure the error."

The presiding judge replied in substance:

> "All right, proceed."

Oral argument was thereafter confined to the merits, and none to defective authentication (Rehearing petition, pp. 3, 37).

In that supplemental brief your petitioner called to the Court's attention the facts that each of the bills was assented to and actually allowed and cited authorities and statutes to the position that that Court should treat the error as harmless and give these bills their intended legal effect by treating them as though the imperfect authentication had been perfected.

The resultant facts and errors are:

1. This decision is in conflict with another Circuit Court of Appeals decision which had established the practice of the Federal Courts years ago.

2. Two important Federal statutes regulating practice are misinterpreted.

(*a*) The trial judge's personal mistake was "harmless error" within U.S. Code, tit. 28, sec. 391.

(*b*) The mistake was amendable within U.S. Code, tit. 28, sec. 777.

The Circuit Court of Appeals not only erroneously interpreted, but misapplied, these statutes.

3. The rule of "judgment term," limiting action after the expiration of the judgment term, was erroneously applied by the Court in deciding that the application of this rule precluded a curing of an error such as here existed.

4. That the case was pending in the Circuit Court of Appeals when the question was first raised does not prevent amendment. That the Court was in error in deciding the contrary.

5. So far as the Circuit Court of Appeals had discretionary power, on the facts of these cases, where the signature of the trial judge was in accordance with recognized custom and where the established practice of the circuit showed a long-continued condonation of that custom, the Circuit Court of Appeals did not use a sound judicial discretion in inflicting on the appellant so severe a penalty for a fault for which it was in no wise blameworthy.

Compare *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 386-387.

Relief here is sought under the provisions of the United States Code, tit. 28, sec. 347.

Argument.

I.

THE PREVIOUS PRECEDENT IN FEDERAL PROCEDURE ESTABLISHED A CONTRARY PRACTICE.

It is, of course, difficult to get reported cases from Circuit Courts of Appeals dealing with a situation such as ours as, we believe, most of such cases were so liberally dealt with as to be handled without opinions on such issues. Reported decisions where this issue has arisen are almost nil. The one Circuit Court of Appeals which has dealt with the same principle and in an identical situation is the Eighth Circuit. The case arose in 1924:

> "The first ground of the motion to dismiss rests upon this condition of the bill of exceptions. At the end of the recital of the proceedings at the trial appears the usual form of an approval of the bill of exceptions with the dates blank and the place for the signature of the judge blank, just over the words:
>
> " 'Judge District Court of U. S. Southwestern Division, Western District of Missouri.'
>
> "Also below this appear the words:
>
> " 'The above and foregoing bill of exceptions is hereby approved, Griffin & Orr, Attorneys for Defendant William J. Burns International Detective Agency, Inc. McReynolds and McReynolds and John Flanigan, Attorneys for First National Bank of Sarcoxie, Missouri.
>
> " 'Let the bill be filed and the filing show of record as of this 25th day of February, 1922.
>
> ARBA S. VAN VALKENBURGH, Judge.'
>
> "This condition of the bill of exceptions convinces that counsel for the plaintiff prepared it, and submitted it to the counsel for the defendants; that thereafter

counsel for the plaintiff either presented it or caused it to be presented to the trial judge; that he intended to allow and certify it in the usual form, but by mistake wrote his name in the last blank for his signature, instead of in the blank at the foot of the usual certificate. He would not have ordered the bill of exceptions filed, if his mind had not assented to its approval, and as counsel for the defendants stipulated that the bill of exceptions was correct, the mistake of the judge in the placing of his signature ought not to deprive the plaintiff of the benefit of her writ of error. U. S. Compiled Statutes, §1591. The motion to dismiss the writ of error is therefore denied."

Steen v. *First National Bank,* 298 Fed. 36, 37, 38 (C.C.A. 8).

This case has stood unchallenged as a precedent for the intervening eight years until the decision of our Court. Our case and this cannot be distinguished on principle. We therefore ask that this decision be followed.

II.

LIBERALIZED FEDERAL PRACTICE DOES AWAY WITH SUCH TECHNICALITIES OF PROCEDURE AS WERE HERE APPLIED.

In the administration of justice any system of procedure should aim to make the attainment of a just decision more sure. Even before the days of Jeremy Bentham common sense rebelled against antiquated court procedure which was a pitfall for the unwary and a means of profit for the skillful practitioner.

So slowly have court reforms lagged in this country that we are still behind England, where more than forty years ago Baron Bowen could proudly boast of English procedure:

"Every amendment can be made at all times and all stages in any record, pleading or proceeding that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

1 Select Essays in Anglo-American Legal History, 541 (1907), Charles Bowen.

It is in cases like the present that a supreme opportunity is afforded this Court to give realization to those ideals which, although recently expressed in a dissenting opinion, we feel sure express the unanimous sentiment of the whole Court:

"A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity."

Reed v. *Allen*, 52 Sup. Ct. Rep. 532, 537.

Since the time the Federal judiciary system was established in 1789 it has at least been the lawyers' ideal that the administration of justice of the Federal Courts might be freed as far as practical from slavish adherence to precedents which from one cause or another had grown into hard and fast rules of procedure as the law made its slow progress from mediaeval lawyers' refinements to become a working machine for administering practical justice. The very act establishing the Federal judiciary was a first step in this direction in that it—

"emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the

administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice."

McDonald v. *State of Nebraska*, 101 Fed. 171, 177. See also *Parks* v. *Turner*, 12 How. 39, 46.

While more or less popular protest continued from the beginning of our American Courts against the technicalities of the law, reforms through legislation have lagged. Spasmodically steps in advance have been incidentally enacted into statutes, such as in the Act of June 1, 1872 (c. 255, sec. 3), but, by and large, the burden of advance and improvement has been upon the judges themselves. Only within the last twenty-five years has popular clamor to some small extent made itself articulate in legislative progress for the elimination of procedural technicalities.

In 1915 Congress passed an act doing away with some still-persisting artificialities of Federal pleadings and procedure. This act not only freely allowed at any stage amendments of pleadings, but permitted a change of form of action from equity to law or from law to equity (U.S. Code, tit. 28, sec. 397); and provided for the interposition of equitable defenses and the granting of equitable relief in actions at law; gave the Appellate Courts full power to render such judgment upon the record as law and justice required without too nice a regard to technicalities (U.S. Code, tit. 28, sec. 398); also permitted to be shown at any stage in the litigation that Federal jurisdiction based on diversity of citizenship existed (U.S. Code, tit. 28, sec. 399).

Act March 3, 1915, c. 90.

In 1919, as another step of progress, Congress passed an additional act further unfettering Federal Appellate Courts

by giving them power to render decisions based on the substantial rights asserted by litigants even though there were procedural defects in presenting them. There was then added to the Judicial Code the provision:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391.

This as well as all these Federal statutes of similar nature previously enacted were—

> "designed to free the administration of justice in the Federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."
>
> *McDonald* v. *Nebraska,* 101 Fed. 171, 176 (C.C.A. 8).

The "defects" and "technical errors" which the last statute eliminates have to do with shortcomings in the technique of the judicial procedure which a litigant must use to assert his substantial rights. The shortcoming here in the form of the judge's signature authenticating agreed-upon bills of exceptions concerns only the method of asserting our rights.

When in ancient practice the Appellate Court had before it the original evidence witnessed by the trial judge as the bill of exceptions it well may have been of importance that

the evidence of the allowance of that bill should have been under the hand and seal of the trial judge, followed by his confession or denial thereof in person before that Court.

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 389.

In modern practice, however, and more recently by statute, the Appellate Court sees only a printed copy of the bill of exceptions, with its authentication, and takes the contents of the bill and the evidence of its allowance solely from the printed transcript "Certified under the hand of the Clerk of the lower court and under the seal thereof."

U.S. Code, tit. 28, sec. 865.

The general rule requiring judicial signature must, therefore, now be for procedural regularity and judicial dignity, and not for any actual utilitarian necessity of standing as a witness to the contents of the bill.

Where this Court in modern practice has enforced with any strictness rules relating to bills of exceptions, it has done so for "substantial" and not "technical" errors.

> "Strict requirements are thus insisted on so as to make certain that the reviewing court shall have before it an accurate account of the evidence or exhibits, which were before the trial court in the original hearing of the issues of the case, properly certified."

Krauss Brothers Lumber Co. v. *Mellon,* 276 U.S. 386, 390.

The case at bar presents no uncertainty as to the record, for the Appellate Court can completely ignore the defective signature and rely on other recitals of the record certified under seal by the clerk of the District Court (R. 226, 263) which show:

> "On the 20th day of August A. D. 1930, the substitute bill of exceptions, motion to amend substitute bill of exceptions and the bill of exceptions concerning the plaintiff's motion for a new trial are allowed" (R. 6).

Record, 7, shows entered on the bill of exceptions:

> "Filed August 8, 1930; amended and allowed August 20, 1930."

To a like effect see R. 226, 238, 239.

This same problem was present in one of our recent Massachusetts cases where a Superior Court judge endorsed with initials only a denial of a motion to vacate judgment. The Appellate Court felt constrained to hold that the initials must be disregarded as a judge's signature, but the official attestation of the clerk of the lower Court to the effect that the motion to vacate judgment had been denied appearing in the record the Appellate Court took official cognizance of the record as a whole.

Fairbanks v. *Beard*, 247 Mass. 8, 9.

It is respectfully submitted that our case shows no "total failure to observe an important regulation in matter of substance" as in *Barber Asphalt Co.* v. *Standard Co.*, 275 U.S. 372, 384.

Under this statute what is incumbent upon an Appellate Court is that the Court be—

> "required, however, by the Act of February 26, 1919 (U. S. C. A. §391) on hearing of an appeal, to give judgment 'after an examination of the entire record before the court, without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties' . . . courts exist to do justice; and it would be a reproach to any legal system to deny a litigant relief, to which upon his pleadings and proof he is en-

titled, merely because his counsel have come in by the wrong door of the court."

Clarksburg Trust Co. v. *Commercial Casualty Ins. Co.*, 40 F. (2d) 626, 634 (C.C.A. 4).

The respondent in its prior brief (p. 11) argues that this statute translates "into statutory form" a rule previously recognized by this Court, and nothing more, and cites:

Vicksburg &c. R.R. v. *O'Brien*, 119 U.S. 99, 109 (Brief, p. 11).

The respondent, however, ignores the rule appearing in the majority opinion, at page 103:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party."

The error of which we complain is that the Circuit Court did not apply this statute in our case. Within the above rule the errors complained of clearly "operate to the substantial injury of the party against whom it was committed."

The case at bar presents an instance of where there was compliance with all requirements, imperfect only in that the judge signed his name informally. The mistake was not that of a litigant, but solely that of the judge (Request of judge, Rehearing petition, p. 42). It was at worst a mere irregularity of form. There is no question but that it was the judge's signature. The fact that he did not write his name in full was an error of the most harmless kind, in no way doing any injustice to the respondent. If ever an error can be "harmless," is not this an extreme instance? If ever a defect is "technical," is not this the most technical of such defects?

III.

THE MISTAKE WAS AMENDABLE.

The amendment asked was only to perfect a partial or imperfect authentication of the bill. It sought only to give effect to the trial judge's act allowing the bill. It neither amends nor disturbs the judgments themselves, nor imports or detracts any substantive item not already in the case.

> "DEFECTS OF FORM; AMENDMENTS.—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, *in any court* of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."
>
> U.S. Code, tit. 28, sec. 777 (originally section 32 of the Judiciary Act of 1789).

From the beginning this Court announced, and all Federal Courts consistently have followed, that the intended purpose of the statute is remedial, entitled to a most liberal construction and intended to avoid miscarriage of justice through technical faults of form.

> "The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20

(now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281 (per Story, J.).
Norton v. *Larney,* 266 U.S. 511, 516.
Taylor Co. v. *Anderson,* 275 U.S. 431, 438.

"The discretion of the court to allow amendments is so clearly conferred by section 954 of the Revised Statutes (U. S. Comp. St. 1901, p. 696) that it is unnecessary to cite any of the numerous cases on the subject. When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence."

Bedford v. *J. Henry Miller, Inc.,* 212 Fed. 368, 370 (C.C.A. 4).

"Under section 954 of the Revised Statutes the right of amendment extends to the 'summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,' and may be

exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment."

McDonald v. *Nebraska,* 101 Fed. 171, at 177 (C.C.A. 8).

Under this statute the power of an Appellate Court "in its discretion to allow such amendments—and its duty to do so in appropriate cases, cannot be doubted."

Norton v. *Larney,* 266 U.S. 511, 516.

Allowance of a bill of exceptions is the main element. Signature is the form by which that allowance is evidenced. It is like a writ, issuing from Court, lacking a seal of the Court, or a signature, or wanting some other such element. In such instances Federal Courts have repeatedly declared such defects in writs as lack of a seal, lack of a return day, or lack of the proper signature, lack of the proper test, or the like mere matters of form, capable of amendment.

United States v. *Turner,* 50 Fed. 734.
Cotter v. *Alabama, G. & S. R. Co.,* 61 Fed. 747.
Bryan v. *Ker,* 222 U.S. 107, 112.
Miller v. *Texas,* 153 U.S. 535.
Texas & Pacific Ry. Co. v. *Kirk,* 111 U.S. 486, 487.

Moreover the bill, with its authentication, whether complete or imperfect, is a record of the trial Court (*Pomeroy's Lessee* v. *Bank of Indiana,* 1 Wall. 592, 599), and as such the authentication at least is capable of amendment by that Court. While a record cannot lawfully be amended after the term unless there is official evidence on which to base an amendment, and something to amend, where those two ele-

ments exist the amendment may be had *nunc pro tunc.* This Court has said that even where there is no evidence of official action beyond the judge's recollection of the facts, any entry justified by such recollection may be made *nunc pro tunc.*

In re Wight, 134 U.S. 136.
Michigan Ins. Bank v. *Eldred,* 143 U.S. 293, 299.
In re Plymouth Cordage Co., 135 Fed. 1000, 1003 (C.C.A. 8).
Brown v. *United States,* 196 Fed. 351, 353 (C.C.A. 7).

It is a puzzle just why the Circuit Court of Appeals chose to pick out *Origet* v. *United States* as its precedent. There are six cases from this Court which have touched this subject. The other five, some before and some after *Origet* v. *United States,* we submit recognize that a defective authentication may be amended.

The principle which we urge—that defective authentication is amendable—is illustrated in the decisions of this Court, one of which seems to deny and five to recognize it.

1. *Mussina* v. *Cavazos,* 6 Wall. 355, at 363 (1867):

> "Whatever might be our opinion of the exceptions which appear in the record, if they were presented in such a way that we could consider them, we find them beyond our reach. The bill of exceptions, or what purports to be a bill of exceptions, covering more than three hundred and fifty pages of the printed record, is neither signed nor sealed by the judge who tried the case; and there is nothing which shows that it was submitted to him or in any way received his sanction."

The underlined clause was unnecessary to the decision unless the Court considered the defect amendable had there been anything "which shows that it was submitted to him [the trial judge] or in any way received his sanction."

2. *Blitz* v. *Brown,* 7 Wall. 693, at 694 (1868):

The clerk's certificate to the transcript of record submitted on writ of error was a blank form without seal of court or signature of clerk. Held, there was no authentication whatever, so the Court was without jurisdiction and the writ was dismissed.

3. *Origet* v. *United States,* 125 U.S. 240, 243, 244 (1888):

The bill of exceptions was signed "A. B." The Court held the initials "A. B." not the signature of the judge, not a sufficient authentication, nor sufficient evidence of its allowance by the judge of the Court and refused to consider its contents. There was nothing to show who "A. B." was, or anything to indicate that if properly authenticated the bill of exceptions merited a review, or that any effort had earlier been made to have the mistake corrected. The implication is that the right of amendment was denied.

4. *Idaho & Oregon Land Co.* v. *Bradbury,* 132 U.S. 512, 513 (1899):

This was a case of defective authentication of the transcript of the record. The certificate of the clerk was complete except for signature, which was omitted. Although recognizing the authority of *Blitz* v. *Brown,* the Court here held:

> "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction but of practice. It is, therefore, within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk."

This decision overrules the implication in the Origet case.

5. In *Michigan Insurance Bank* v. *Eldred*, 143 U.S. 293, 298, 299, this Court considered specifically the question of amending bills of exception, seasonably filed, after the judgment term, and held:

> "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. . . .
>
> "The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. Hanna v. Mass. 122 U.S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, cannot be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. In re Wight, 134 U. S. 136."

The entire second paragraph, and especially the last sentence, was unnecessary unless the Court recognized the possibility of amendment after the judgment terms *for "fault or omission . . . of the court."*

6. This Court last dealt with imperfect authentication of a bill of exceptions in *United States (Ex rel. Kinney)* v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283, 284:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record contains no bill of exceptions. The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J. B. McP., trial judge,' and signed by the plaintiff, is not a bill of exceptions (Origet v. United States, 125 U. S. 240, 243), but if it were to be treated as a bill of exceptions as all the matters therein referred to depend for their solution upon an examination of the evidence which is not in the record, it follows that we have no means of determining whether reversible error arose from an action of the court on any of the subjects to which the paper refers. This being the case, it becomes our duty to affirm."

This clause underlined was unnecessary unless the power of amendment existed to be exercised in a meritorious case even after judgment term.

IV.

"JUDGMENT TERM."

Our Circuit Court of Appeals decided that it was too late to send the case back for amendment, as the term at which the judgments had been entered had expired and the District Court had lost jurisdiction (R. 267). We do not question that the general rule is:

> "That the bills of exceptions shall be signed before

the trial court loses jurisdiction of the cause by expiration of the term or such time thereafter as may have been duly prescribed."

Exporters v. *Butterworth-Judson Co.*, 258 U.S. 365, 369.
Walton v. *United States*, 9 Wheat. 651, 657-658.

The statute which requires signature to a bill of exceptions does not include any "judgment term" limitation.

U.S. Code, tit. 28, sec. 776.

That rule orginated in ancient English procedure where the Crown commissioned the judge to hold a particular term of court and where the authority of that judge ceased with the expiration of that term and commission. In this country, however, the powers of Courts and judges "is lodged by the Constitution and is a continuing power," so that the rule here maintains without statutory mandate and only as one of procedure and not of power.

Western Dredging & Importing Co. v. *Heldmaier*, 116 Fed. 179, 181 (C.C.A. 7).

In an early case in answer to the argument that the application for the amendment came too late Judge Story said:

"And first, as to the time of making the amendment. It is said that it should have been either at the term when the order for the arrest of judgment was made, or at the furthest, at the next succeeding May term of the court; and it was too late to make it a whole year afterwards. But there is no time absolutely fixed, within which such an amendment should be moved. All that the court requires is that it should be done within a reasonable time; and when no such change of circumstances shall have occurred as to render it inconvenient or inexpedient. Nothing is more common than motions

to amend the record after a writ of error has been brought; nay, after a writ of error has been argued in the court above, and sometimes even after judgment in the court of error, pending its session."

Matheson's Adm'rs v. *Grant's Adm'r,* 2 How. 263, 281.

At the same time this general rule has been so honored by its breach and so many classes of exceptions have gained recognition that there seems to be little left of the harsh terms of the original rule.

". . . This rule is not without exceptions that there may be circumstances justifying the signing of the bill after the expiration of the term at which trial was had. The rule is not an iron clad rule. It is a rule for the protection of the rights of parties, but is not to be applied with vigor to defeat the ends of justice where the party seeking relief is without fault. . . . But there may be circumstances not resulting from laches of the parties which should avail to relax the rule."

Western Dredging & Importing Co. v. *Heldmaier,* 116 Fed. 179, 182 (C.C.A. 7).

Not only where the circumstances of a particular case have justified it has a bill of exceptions been allowed by a trial judge after the expiration of the judgment term, but even been compelled by mandamus.

Such exceptions have been recognized by this Court—

Under "very extraordinary circumstances":

Muller v. *Ehlers,* 91 U.S. 249, at 251.

Jones v. *Grover & Baker Sewing Machine Co.,* 131 U.S. Appx. cl.

Michigan Insurance Bank v. *Eldred,* 143 U.S. 293, 298.

Where justice requires a suspension of the rule:

United States v. *Breitling,* 20 How. 252, 254.
Dredge v. *Forsyth,* 2 Black, 563, 568.

Under "special circumstances":

Hume v. *Bowie,* 148 U.S. 245, 253.

Where delay is caused by the judge, and assent is given within the term:

Davis v. *Patrick,* 122 U.S. 138, 143.
Waldron v. *Waldron,* 156 U.S. 361, 378.

Where the opponent is estopped from objecting to a late signature:

Chateaugay Ore & Iron Co., Petitioner, 128 U.S. 544, 555.

Where delay is through fault of opponent:

Hunnicutt v. *Peyton,* 102 U.S. 333, 355.

For "sufficient reasons":

Hunnicutt v. *Peyton,* 102 U.S. 333, 355.

Where the judge is away, consent seasonably given:

Taylor v. *United States,* 52 Sup. Ct. Rep. 466.

Where the fault is the Court's:

Michigan Insurance Bank v. *Eldred,* 143 U.S. 293, 299.

In our Circuit Courts of Appeals the following have been held sufficient within the recognized exceptions:

Inability of Court stenographer to transcribe notes on exceptions:

Dalton v. *Gunnison,* 165 Fed. 873 (C.C.A. 9).

Trial judge ill:

Roberts v. *Bennett,* 135 Fed. 748 (C.C.A. 2).
Re Bills of Exceptions, 37 F. (2d) 849, 851 (8) (C.C.A. 6).

Exhibits mislaid without fault of excepting party:

Pittsburgh Gas & Coke Co. v. *Goff-Kirby Coal Co.,* 151 Fed. 466 (C.C.A. 3).

Presented in time, but delay in settling:

Southwest Metals Co. v. *Gomez,* 4 F. (2d) 215, 218 (C.C.A. 9).

Refusal of judge to sign in form submitted:

Scaife v. *Western North Carolina Land Co.,* 87 Fed. 308 (C.C.A. 4).

Delay for convenience of trial judge:

Western Dredging & Improvement Co. v. *Heldmaier,* 116 Fed. 179 (C.C.A. 7).

Oral order only of trial judge at time of directing verdict:

Koewing v. *Wilder,* 126 Fed. 472, 474 (C.C.A. 2).

Delay occasioned by adversary or judge:

Franklin County v. *Furry,* 144 Fed. 663, 664 (C.C.A. 7).

Seasonably stipulated for settlement, but delay caused by judge:

Schmid v. *Standard Steel Car Co.,* 202 Fed. 1023 (C.C.A. 2).

Excepting party not guilty of neglect, bill presented in time, judge refused to sign:

Re Federal Life Insurance Co., 248 Fed. 908 (C.C.A. 7).

Where the parties have done all they can:

Re Bills of Exceptions, 37 F. (2d) 849, 851 (9) (C.C.A. 6).

Some of these cases turn on consent of an opponent given during the term. As jurisdiction is never conferred by consent (*Exporters* v. *Butterworth-Judson Co.*, 258 U.S. 365, 369), it follows that the rule and its exceptions are procedural and not jurisdictional, to be enforced to accomplish, and not to defeat, substantial justice.

Each of our bills contains a prayer for allowance. Each is assented to without limitation. The assent continues until all that is necessary is done to give the bills their intended legal effect and brings them within the "consent" exceptions, *supra*. The other facts of our case bring these bills within the principle of the other exceptions to the rule. They actually and seasonably were allowed (R. 223, 226, 238, 239).

If the defect was so amendable within these exceptions to this general rule, then the amendment was one which the District Court was bound to make, and the Circuit Court of Appeals had both the power and duty to treat the bills as amended and act accordingly.

Norton v. *Larney*, 266 U.S. 511, 516.

V.

APPEAL DOES NOT PREVENT RELIEF.

Treating the case as one where "the District Court has lost jurisdiction of the case" (R. 267) by reason of the judgment term expiration and the appeal, the Circuit Court

of Appeals held that both it and the District Court were without power now to amend or to correct a "harmless error." The fact of an appeal pending in the Circuit Court of Appeals does not prevent any relief otherwise proper.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

VI.

RESPONDENT'S CLAIM OF INSUFFICIENT CERTIFICATE.

Before the Circuit Court of Appeals the respondent made the further claim that the record was technically defective in that "there is no certificate of the judge to the effect that the bill of exceptions contains all material evidence in this cause." The bill specifically states:

> "The following is all the testimony material to the issues presented in this Bill of Exceptions and submitted herewith are copies of all the exhibits in evidence material to these issues and which are not set forth at length or in their material part in the testimony itself" (R. 11).*

The bill with that statement was assented to by this respondent (R. 222) and was allowed by the Court.

The bill of exceptions (R. 11, 121, 123, 207) and what follows each reference, with the stipulation before this Court,* shows a course sufficient to bring this record within the principle of *Clyatt* v. *United States*, 197 U.S. 207, 221, where the Court held: "we are of the opinion that the Bill of Exceptions should be taken as containing all the evidence."

Compare also *Crowe* v. *Trickey*, 204 U.S. 228, 235.
Gunnison v. *Rollins*, 173 U.S. 255, 262.

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*The copies of the exhibits referred to, bound with the signed stipulation concerning them, was filed with the District Court, transmitted to the Circuit Court of Appeals, and by the clerk of that Court to, and is now before, this Court. (R. 224.)

Even were there any justification for the respondent's contention, it would apply only to assignments of errors Nos. 28 and 29 (R. 252) based on the refusal of the trial Court to direct a verdict for Ohl upon all the evidence. Even were there a failure to report all the evidence, it would not concern the numerous remaining assignments of errors.

United States v. *Copper Queen Mining Co.*, 185 U.S. 495, 497.

Krauss Brothers Lumber Co. v. *Mellon*, 276 U.S. 386, 390.

VII.

A REACTIONARY AND UNWORTHY DECISION.

This decision sounds a century late. It belongs to the period of a hundred years ago, when the prisoners were acquitted because the property stolen was that of Marie Jones and not that of Mary Jones. Decisions like this rankle, and are a blot on the judicial escutcheon. It works an injustice in the case at bar. That is bad enough, but, worse, it establishes a narrow precedent encouraging practitioners to treat the practice of the law as a game to be won by nimble wits manipulating trivialities.

The way a trial judge signs a paper should never be allowed to be decisive of the rights of parties, especially when neither the party nor his counsel can control the judge's form of signature. If the form of the judge's signature be once allowed to be a determining test of litigants' rights, then there is a possibility of a further refinement to determine what should be the standard of the judge's proper signature. Must he sign in the same form in which his commission issues? May he shorten his formal official signature from James Arnold Lowell to James A. Lowell or to J. A. Lowell?

In his request the district judge sets forth that the error in the signature was his, for which counsel for appellant was

in no way responsible (Rehearing petition, p. 42). The course followed was in accordance with the common practice in Massachusetts, condoned by this very Circuit Court of Appeals (Petition, p. 8). If the Court felt these bills were not properly authenticated, it affirmed the judgments "because of the transgression—and this notwithstanding the transgression was largely due to its own course of action." Had it previously in the early days of this practice discountenanced such signatures, the District Court judges and clerks would have changed the practice. Under these circumstances affirming the judgments "was a very severe penalty to impose for action which had the court's implied sanction up to that time." Here the Circuit Court "passed the bounds of a sound discretion in affirming the" judgment "because of the transgression." The fault being the trial judge's personal fault, and not your petitioner's, the Circuit Court of Appeals "should have remitted the transcript to the District Court to the end that a further opportunity might be had to comply with the" rule.

Barber Asphalt Co. v. *Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386, 387.

But even beyond this, such a technicality is unworthy of modern practice of law. The decision itself was unnecessary and undesirable, not merely because it worked an injustice, but as a step backwards in face of the precedents, and the liberalized decisions of this Court. Already the decision has been unfavorably commented on in the official publication of the Massachusetts State Bar Association.

Mass. Law Quarterly, August, 1932, number, page 58.

We therefore respectfully request this Court to hold that in each of these cases the bills of exceptions were duly allowed and sufficiently signed (authenticated), and with the appeals were properly before the Court of Appeals for determination on their merits.

Part Two.

Specification of Assigned Errors Urged.

In this brief we urge the following assigned errors, and indicate where in our brief we discuss them:

Error No.	Record page	Section	Brief page
1	240	B (2)	35
		B (3)	38
2	244	B (4)	40
3	244	C (4)	57
4	244	C (4)	57
7	245	F (3)	81
8	246	F (3)	82
9	246	B (6)	47
11	246	F (3)	82
12	247	F (3)	82
18	249	F (2)	81
19	249	F (1)	80
21	250	C (4)	57
23	251	F (4)	82
24	251	F (1)	80
25	251	F (1)	80
26	251	D (2)	73
27	251	D (2)	73
28	252	D (1)	69
		C (3)	52
29	252	C (3)	52
30	252	D (2)	73
31	252	D (2)	73
32	252	D (1)	69
		D (2)	73
33	253	B (2)	35
34	253	B (4)	40
		B (5) (a)	41
35	254	B (5) (a)	41

Error No.	Record page	Section	Brief page
36	255	B (5) (b)	47
		C (4)	57
37	256	B (6)	47
		C (4)	57
38	256	B (6)	47
39	256	A	33
		C (4)	57
40	257	B (6)	47
41	257	C (4)	57
42	259	C (3)	52
		C (4)	57
43	259	B (1)	34
44	259	C (3)	52
45	260	G (1)	83
46	260	G (1)	83
48	261	E (1)	75
49	261	E (2)	76
50	261	G (2)	84
51	261	G (2)	84
52	261	G (2)	84
53	261	G (2)	84
54	261	I	87
55	261	H	86

Statement of Facts.*

These are two actions at law tried together before a jury. The first was a suit by Ohl to recover on a series of notes given by Smith (R. 2). There was a verdict for the defendant (R. 5).

The second action by Smith against Ohl was upon breach of warranty contained in a written contract of sale of a machine and other property for which the notes were given

* References to the record and exhibits in the printed record are indicated by the page number. References to exhibits appearing in the stipulation, before the Court "as part of the original Record," are indicated by the letter "S," followed by the page number in that stipulation. (R. 224.)

(R. 230). There was a verdict for Smith for $7500 (R. 236).

Ohl was a manufacturer in Newark, New Jersey, of machines for stamping, rolling and cutting sheet metals (R. 145). These power presses or brakes, as they were called, were designed to bend metal (R. 47, 48).

Smith was a manufacturer in Chelsea, Massachusetts, of structural steel and ornamental iron, and wanted the machines in question for the purpose of manufacturing steel stairs (R. 15, 44).

The business between the parties was initiated by Smith getting in touch with a broker and then with Ohl (R. 44). There ensued correspondence which will be discussed more in detail later, but which in general was an offer on Ohl's part to sell Smith one of its power presses according to specifications and blueprints and an acceptance on Smith's part of the offer, but the offer and acceptance specifically contemplated a formal written contract to cover the transaction (R. 47, Ex. 13; R. 17, Ex. B; 18, Ex. C; S. 1, Ex. D). In addition to the machine there were similar negotiations for the purchase of a motor, of accessories and of dies. These negotiations, offer and acceptance were also made each in contemplation of a formal written contract covering the transaction (R. 20, Ex. F; R. 21, Ex. O; S. 34, Ex. 17). As a matter of fact, at a later stage a formal written contract under seal between the parties was executed by both embodying the purchase and sale of the press and of the other items (R. 11, Ex. A).

Ohl built the press in Newark, and when it was ready for transportation to Chelsea, by arrangement, Mr. Smith himself, the president and treasurer of the Smith Company and its master mechanic, Hovasse, came to Newark to examine the press and see it in operation (R. 24). They actually saw it operated, and Hovasse was instructed in the operation of the press, its oiling, setting its dies, etc. (R. 25, 26, 40, 58-59, 69, 70, 126, 149, 150).

After two days of such examinations and observation, Hovasse, at Ohl's request, signed Exhibit RR (R. 60), as follows:

"GEO. A. OHL & Co. Newark, N. J.

February 25th 1926

This is to acknowledge that Mr. Hovasse of A. L. Smith Iron Works of Chelsea, Mass., has tested the 12′ 6″— 103,000 lb. Power Press or Brake and Dies and found everything satisfactory. Re:—order #23557.

CHARLES HOVASSE"

The press, accessories, dies, etc., were shipped to Boston March 2, 1926 (R. 27, 29). Ohl then sent to its Boston lawyer the proposed formal written contract (covering the press, motor, accessories and dies) and the notes which had been agreed upon for Smith's signature (R. 27, 29). Smith raised some point on the form in which Ohl had signed this contract and also asked for an express guaranty on the press (R. 29). That guaranty or warranty was added to the contract by a rider physically attached to it (R. 29, 11, Ex. A). Ohl then corrected its signature to Smith's satisfaction and Smith executed the notes and the contract and delivered them to Ohl's Boston lawyer, Shannon, in Boston (R. 29). This is the contract and express warranty relied upon by Smith as the basis for its suit (R. 230). The contract in full is Exhibit A, printed on page 11 of the record.

The press and dies arrived March 15th (R. 60), and under Hovasse's direction, with the assistance of building movers whom he hired, the press was erected (R. 71).

The press was first operated April 15, 1926 (R. 71). It was Smith's claim that from the very beginning the press proved unsatisfactory in operation (R. 8). It therefore became one of the issues of the case whether the unsatisfactory operation of the press was due to any fault of the press or whether it was due to the manner in which Hovasse had assembled it and to the method of its operation.

A second question arose, assuming that there was a breach of warranty of the press, whether any of the notices given by Smith to Ohl of alleged defects in the machine (R. 9, #9) was sufficient as to contents and was given within a reasonable time after the defects were known, or ought to have been known, in compliance with the requirements of the Massachusetts Sales Act. Admittedly the first complaint was not given until June 25th, more than two months after the press went into operation (R. 9, #9a; R. 30, Ex. CC). That first complaint then was of "trouble as the flywheel bearing and disc get very hot" but claimed no breach of warranty therefor. Ohl replied that it was a simple matter to clean out the flywheel roller bearings and grease the machine—any ordinary mechanic can do so (R. 31, Ex. DD). The complaint then for the time being was allowed to drop. It was admitted that the complaint of June 25th was an error and described a condition which did not exist (R. 74, 80), and the Court ruled the notice was "in error" (R. 83). After receiving Ohl's reply Smith continued to use the machine without any further notice or complaint until almost two months later, August 13, when it refused to make further payments on the then-maturing notes (R. 31, Ex. EE).

Then, four months after it had been using the machine, it made a complaint of defects in the machine in general terms which did not, we again submit, comply with the Massachusetts Sales Act, in advising Ohl in what way the press failed to comply with the contract requirements or in asserting a breach of warranty claim. Other notices were later given which will be discussed in detail in the argument.

Without attempting at this stage to go into the details of the controversy as to the efficiency of the press, it perhaps is enough to say that Smith continued to operate the press and at one stage called in some experts to examine it (R. 93), and in the course of the experiments these experts made

they caused the press to break (R. 94), as we claim through no fault of the press, but because Smith previously and these experts had not then handled the machine properly.

It was Ohl's contention on the evidence presented that the press complied with the contract, and that it was entitled to a verdict on the notes sued upon in its suit, and that it was entitled to a verdict in Smith's suit for breach of contract.

Smith pleaded that there was a total lack, as well as a failure, of consideration in our note suit (R. 3). It also claimed in its suit damages for breach of warranty because the machine failed to equal the guaranty (R. 230).

The jury, under a rather confused and misleading charge (R. 218), found two verdicts in Smith's favor (R. 5, 236), so Ohl could not recover on the notes, and Smith, in its suit for breach of warranty, recovered for the amount which it had already paid Ohl on the notes ($4963, R. 220), plus two items of damages ($2531.75, total, R. 109), aggregating $7500 (R. 236). This produced the absurd result that Smith kept, and still keeps, the machine, motor, accessories and dies without any payment and in addition recovers from Ohl money as damages.

The main questions which are presented on the merits in this controversy are:

1. What was the contract between the parties and its proper interpretation?

2. Was there any breach of this contract?

3. If there was a breach of warranty on the part of Ohl, did Smith comply with the Massachusetts Sales Act so as to be able to enforce a claim for breach of warranty?

4. If Smith could recover for a breach of warranty, what was the correct rule of damages?

In addition to these questions, there arose other questions of pleading and practice, and questions as to certain incidents which arose in the conduct of the trial. These

questions will be separately presented and discussed in our argument.

Argument.

A.

THE EFFECT OF PLEADINGS AND OF SPECIFICATIONS.

Under the Conformity Act (U.S. Code, tit. 27, secs. 724, 725) the trial court was bound to follow the State statutes and practice as interpreted by the Supreme Judicial Court of Massachusetts.

Inasmuch as in each case we relied upon Smith's specifications filed in compliance with Ohl's motion (R. 3, 8, 233), and as throughout the trial Smith was allowed to advance claims outside of, or inconsistent with, its specifications, it becomes of importance at the outset to consider the effect of specifications and the rights of parties thereunder.

Under the Massachusetts statutes a party is bound by his pleadings.

> "Pleadings shall not be evidence on the trial but the allegations therein shall bind the party making them."
>
> Mass. G.L. c. 231, sec. 87.

Specifications under pleadings are authorized by statute (Mass. G.L. c. 231, sec. 70), and are "more than a mere technical statement in a pleading." They are presumed to have been made under client's instructions, and the party specifying is bound by and limited to them.

Clarke v. *Taylor,* 269 Mass. 335, 337.

They have the effect of admissions.

Boston Acid Mfg. Co. v. *Moring,* 15 Gray, 211, 215.

Oscangow v. *Arms Co.,* 103 U.S. 261, 263.

The Aracan, 11 F. (2d) 791 (C.C.A. 2).
United States v. *Southern Dredging Co.*, 251 Fed. 400, 401.
Kansas & A. Railway Co. v. *Morton*, 61 Fed. 814, 816 (C.C.A. 8).

In our cases Smith specified particular defects actually observed, time of observations and dates of notices thereof to Ohl. The Court should have ruled, as requested, that Smith was bound by and limited to items specified (R. 8, 9, 10). Ohl's requests 25, 26, 27 (R. 214) and 62 (R. 217; Assignment 39, R. 256) to that effect should have been given and the exceptions to the refusals so to rule should be sustained.

B.

THE CONTRACT IN ISSUE AND ITS EFFECT.

(1)

THE CONTRACT IS A MASSACHUSETTS CONTRACT.

After Ohl signed the contract in Newark, it was forwarded to Massachusetts, where Smith then signed and delivered it to Ohl's counsel in Boston (R. 27, 29). Thus signed and delivered it is a Massachusetts contract.

Hogue-Kellogg Co. v. *G. L. Webster Co.*, 22 F. (2d) 384.
Wastum v. *Lincoln National Life Ins. Co.*, 12 F. (2d) 422.

And the law of Massachusetts governs.

Federal Surety Co. v. *Minn. Steel & Machine Co.*, 17 F. (2d) 242.
Brace v. *Gauge Kresno Construction Co.*, 36 F. (2d) 661.

Dickey v. *Hurd*, 33 F. (2d) 415, 418.
Bird & Son v. *Guarantee Construction Co.*, 295 Fed. 451, 455.
Cooper v. *Philadelphia Worsted Co.*, 68 N.J. Eq. 622.

The Federal Court must apply the Massachusetts Sales Act and construe the contract in accordance with the decisions of the Supreme Judicial Court of Massachusetts.

Stebbins v. *Riley*, 268 U.S. 137, 146.
Central Union Co. v. *Edwardsville*, 269 U.S. 190, 195.
Savings Bank of Richmond v. *Nat. Bank*, 3 F. (2d) 970, 973, and cases.
U.S. Code, tit. 28, sec. 725.

Ohl's 32d request (R. 214) should have been given (Assignment 43, R. 259), and its exception to the refusal thereof should be sustained.

(2)

THE CONTRACT IN ISSUE IS A FORMAL WRITTEN CONTRACT WITH AN EXPRESS WRITTEN WARRANTY.

Smith claimed under a written contract an implied warranty of suitability for a particular purpose (Mass. G.L. c. 106, sec. 17 (1)) not consistent with the express warranty in the written contract (R. 230; Mass. G.L. c. 106, sec. 17 (6)). It is therefore important to determine what was the contract between the parties and whether or not the written contract declared upon was formal and included all the essentials of a purchase and sale contract.

The evidence was undisputed that Smith obtained quotations of Ohl presses from a Boston broker and got in touch with Ohl (R. 44). On November 9, 1925, Ohl offered to sell

Smith one of its presses, and submitted prices, terms, specifications and blueprints (R. 45, Ex. 13; R. 47, Ex. 14; S. 28-33).

November 24, 1925, Smith placed an order for a machine to be built which contemplated that a formal contract would be made between the Smith Company and Ohl (R. 17, Ex. B). Ohl acknowledged the communication (R. 18, Ex. C; S. 1, Ex. D). The offer, acceptance and acknowledgment each contemplated a formal written contract (R. 47, Ex. 13; R. 17, Ex. B, Ex. C; S. 1, Ex. D).

Before the machine was finished or the formal contract executed Smith requested Ohl to design dies for bending stair treads and risers for the press (R. 19, Ex. F; R. 53, Ex. 16 (a)).

January 19, 1926, Ohl accepted this order, sending Smith an acknowledgment (R. 21, Ex. O; S. 34, Ex. 17). Similarly this offer, acceptance and acknowledgment each contemplated a formal written contract later to be signed (R. 19, Ex. F; R. 21, Ex. O; S. 34, Ex. 17).

When Ohl shipped the presses, accessories, motor and dies to Smith on March 2, 1926 (R. 27, 29) it sent to its Boston lawyer, Mr. Shannon, the proposed formal written contract (covering the press, motor, accessories and dies) and a set of proposed notes for Smith's signature (R. 27, 29). After examining the contract Smith suggested that Ohl's signature to the contract be altered, and also wanted an express "guaranty" to be inserted in the contract (R. 29). That guaranty or warranty was added to the contract by a rider physically attached to it (R. 29, 11, Ex. A). Ohl then re-signed his signature, as requested by Smith. Smith executed the notes and the contract and delivered them to Shannon in Boston (R. 29). This contract, and the express warranty therein contained, is the contract set out in Smith's declaration as the basis of its suit (R. 233) and is Exhibit A (R. 11).

The contract purported to be under seal and was in formal language (R. 11).

Before execution the written warranty was added to, and made part of, the formal contract by physical attachment to the contract (R. 29, 11, Ex. A). It incorporated by reference definite specifications which also were in writing (R. 47-49).

Smith pleaded Exhibit A as the complete written contract between the parties (R. 230, Ex. A, R. 11). It is bound to that position.

Mass. G.L. c. 231, sec. 87.

The rider, part of Exhibit A (R. 11), is an express written warranty.

Mass. G.L. c. 106, sec. 14.

It is so pleaded by Smith (R. 231).

In pleading Smith properly described what he got and relied on as a warranty of capacity of the machine to "*bend*" metal (R. 231). The warranty, referring to the contract "specifications" (R. 11, Ex. A; R. 47, Ex. 14), is thus correctly pleaded.

Conversations, correspondence and negotiations preceding a formal written contract, except so far as the correspondence (specifications) may be expressly incorporated in this formal contract, are not admissible. Requests 10, 11 and 12 under assignment 33 (R. 253) should have been granted.

Seitz v. *Brewers' Refrigerating Co.*, 141 U.S. 510.
DeWitt v. *Berry*, 134 U.S. 306.
McGuire v. *Gerstley*, 204 U.S. 489.
Bast v. *Bank*, 101 U.S. 93, 96.
El Dorado Oil Works Co. v. *Société Com. De L'Oceanie*, 182 Fed. 195 (C.C.A. 9).

Murphy v. *India Tire & Rubber Co.*, 29 F. (2d) 228 (C.C.A. 5).
Dunn v. *Mayo Mills*, 134 Fed. 804 (C.C.A. 3).
Newark v. *Mills*, 35 F. (2d) 110, 113 (C.C.A. 3).
Kilroy v. *Schimmel*, 243 Mass. 263.
Bowditch v. *Slattery*, 263 Mass. 496, 498.

The admission of such conversations, correspondence and negotiations prior to the written contract claimed by Smith to have been breached was error, and our exceptions thereto should be sustained (R. 15-16, Assignment 1; R. 240).

(3)

THERE WAS NO IMPLIED WARRANTY OF SUITABILITY, AND PAROLE EVIDENCE TO PROVE SUCH WAS ERRONEOUSLY ADMITTED.

The contract, written, formal, under seal, and signed by both parties, contained all the essentials of a purchase and sale contract (R. 11-14). It was so intended. It contained no ambiguity or words used in other than their ordinary meaning. There is no suggestion of fraud or mistake. No evidence is admissible to vary or enlarge the terms of such a written formal contract by adding prior or contemporary parole negotiations concerning alleged implied warranty of suitability for a particular purpose.

Williston, Sales, sec. 215.
DeWitt v. *Berry*, 134 U.S. 306, 312.
Barrett Co. v. *Panther Rubber Co.*, 24 F. (2d) 329, 335 (C.C.A. 1).
Union Selling Co. v. *Jones*, 128 Fed. 672 (C.C.A. 8).
Bluegrass Canning Co. v. *Steward*, 175 Fed. 537 (C.C.A. 6).
Davis Calyx Drill Co. v. *Mallory*, 137 Fed. 332 (C.C.A. 8).

Tucker v. *Traylor Engineering & Mfg. Co.*, 48 F. (2d) 783, 785 (C.C.A. 10).
Reynolds v. *General Elec. Co.*, 141 Fed. 551, 556 (C.C.A. 8).
Marmet Coal Co. v. *People's Coal Co.*, 226 F. 646 (C.C.A. 6).
Miami Cycle & Mfg. Co. v. *National Carbon Co.*, 268 Fed. 46 (C.C.A. 6).
Boston Consolidated Gas Co. v. *Folsom*, 237 Mass. 565, 567.
Glachen v. *Bennett*, 226 Mass. 316, 319.
Bennett v. *Thompson*, 235 Mass. 463, 467.

This written contract contained a specific warranty made at Smith's request (R. 29) in the following form:

> "We hereby guarantee that the 12′ 6″—103,000 lb. Power Press has a capacity as stated in our specifications of said Press, namely ⅜″ soft steel on square Dies the female of which measures 3″ across the corners, and that the material and workmanship are of the best" (R. 11).

The capacity of the machine contained in the specifications was:

> "capacity ⅜″ soft steel, one bend at a time, on dies the female of which measures 3″ across the corners" (R. 47).

The negotiations of the parties once reduced to a formal written contract, the law says that the writing contains the entire agreement, and all terms previously negotiated about, which were not written into the contract, are held waived or expressly excluded by their very omission.

Glachen v. *Bennett*, 226 Mass. 316.

Marmet Coal Co. v. *People's Coal Co.*, 226 Fed. at 650 (C.C.A. 6).

Bluegrass Canning Co. v. *Steward*, 175 Fed. at 540 (C.C.A. 6).

Davis Calyx Drill Co. v. *Mallory*, 137 Fed. at 334 (C.C.A. 8), and the other cases just cited.

This rule is one of substantive law. Even though incompetent evidence be admitted during a trial, such evidence does not affect the contract itself or the legal obligations of parties thereunder.

Glachen v. *Bennett*, 226 Mass. at 320.

Pitcairn v. *Philip Hiss Co.*, 125 Fed. 110, 113 (C.C.A. 3).

Smith's evidence of conversations and negotiations prior to the execution of this contract, upon which it bases a claim of an implied warranty of suitability for a particular purpose, was incompetent. Its admission was plainly error and the exceptions thereto should be sustained.

Ohl's exceptions under assignment 1 should be sustained (R. 240, 16, 15, 51).

(4)

THE CONSTRUCTION OF THIS CONTRACT WAS FOR THE COURT.

This contract contained no ambiguous words or phrases or any that Smith claimed had any peculiar or trade meaning. Its construction of the contract was for the Court, and the words used were to be taken in their natural, usual and ordinary sense.

General Motors Corp. v. *Abell*, 292 Fed. 922, 926 (C.C.A. 1).

Goddard v. *Foster*, 17 Wall. 123, 142.

Hamilton v. *Liverpool &c. Ins. Co.*, 136 U.S. 242, 255.

Union State Bank & Trust Co. v. *Northwestern Life Ins. Co.*, 55 F. (2d) 1070 (C.C.A. 5).

Burrows & Kenyon v. *Warren*, 9 F. (2d) 1, 4 (C.C.A. 1).

Pitcairn v. *Philip Hiss Co.*, 125 F. 110, 114 (C.C.A. 3).

Faber v. *Mutual Life Ins. Co.*, 250 Mass. 250, 253, and cases there cited.

Reliable Waste Co. v. *Waterhead Mills*, 238 Mass. 496, 498.

Evidence was immaterial and incompetent as to what Smith understood from the Ohl specifications, and the question under assignment No. 2 should have been excluded (R. 244, 56), and requests 70, 71 and 72 (Assignment 34, R. 253) should have been given. Our exceptions should be sustained.

(5)

THE COURT MISCONSTRUED THE CONTRACT AND MISTAKENLY INCLUDED ADDITIONAL WARRANTIES.

(*a*)

"Bend" v. "Set."

In the express warranty there was a guaranty (R. 11), "as stated in the press specifiations," that the machine had a "capacity 3/8" soft steel one *bend* at a time, on dies the female of which measures 3" across the corners" (R. 47).

Instead of expressing the power of the press in "horse power" or "pounds of pressure per inch," or any other unit of measure, the parties choose to express the capacity which the machine should have by a practical operating test. It should have that power which is required to make one bend in a piece of soft steel 3/8" thick on dies the female of which should measure 3" across the corners.

After the metal is *bent* by applying additional pressure it may be *set* so as to retain the shape into which it had been

bent. It was admitted that it takes greater power to *set* metal than to *bend* it (R. 107, 142, 183; see 139, 142). If the machine had a capacity to bend 3/8" material on a 3" die it could bend and set any metal the bending and setting of which did not require a greater power than that which the bending of the 3/8" material on a 3" die required. The machine might both *bend and set* 3/8" material on a bigger die than 3"; 1/4" material might be also both *bent and set* on a 3" die, etc.

Smith's action was based on the failure of the admitted warranty which he correctly claimed in its pleadings was that the press would *bend* "3/8" soft steel on square dies the female of which measures 3" across the corners," and the breach alleged was that it failed so to do (R. 231). His specifications only claimed a failure of the machine to have this *bending* capacity (R. 8, #3d, 5, 6).

The meaning of the two words to "*bend*" and to "*set*" is quite different. To "*bend*" is "to strain or move something having rigidity out of a straight line—to curve—to bow."

> Webster's New International Dictionary (1930), page 209.

To "*set*" is "to fix firmly; to make fast or permanent or stable, to give an unchanging place, form or condition to."

> Ibid., page 1929.

During the trial Smith changed its position and claimed that the machine was guaranteed to have a *setting* capacity. Over Ohl's objections Smith was allowed to develop his case and present it to the jury as though such *setting* capacity was within the scope of warranty of a *bending* capacity.

> See testimony of Lovasse (R. 79, 82) and experts Townsend (R. 94, 95, 100, 107) and Perkins (R. 112, 116, 117-118).

Ohl claimed the press was built to have the required capacity to *bend,* not to *set* the specified metal, and that it was strong enough to bend ⅜" metal on 3" dies (R. 183). Townsend in 1926 had termed this "set" as "squeeze" (see also R. 95, line 27) and condemned it as an operation in this press (R. 105, Q. 3). Yet Smith's experts, including Townsend, in their computations and testimony ignored the express warranty and proceeded on the basis that *bending* in some way or another included *setting,* without anything in the case on which to rest that claim.

> "If a party seeks to make out that certain words in a contract have a different acceptation from their ordinary sense . . . he must prove it . . . by clear, distinct and irresistible evidence."
>
> See *DeWitt* v. *Berry,* 134 U.S. 306, 314.
> *Tampa Shipbuilding & Eng. Co.* v. *General Const. Co.,* 43 F. (2d) 309, 312 (C.C.A. 5).

The trial judge was in confusion about the whole matter, and finally, confessing that he did not understand the situation, left it to the jury with inadequate instructions.

> "There is a minor question of bending, and the difference between bending and setting. I don't personally get the idea of what you want to set steel for, or bend it rather, without setting it. I don't quite see what that amounts to, but you are the arbiters of that and it is for you to say whether in making these risers and stringers that the iron must not only be bent but must be set. All that is within your province" (R. 219).

> "Thus telling the jury, in effect, that they might go outside the guaranty in the written contract to determine the rights of the parties on oral representations, without subsequently making clear that such representations could in no sense be treated as guaranties, or any

part of the contract, or to aid in construing the contract, left a suggestion of guaranty by oral representations running through the case which was prejudicial error."

Murphy v. *Gifford,* 228 Mich. 287, 298.

These words, in their "natural, usual and ordinary sense," are such that a *bending* capacity cannot be construed as inclusive of a *setting* capacity.

Ohl's requests 13, 14, 15, 70 to 76, 17, under assignment 34 (R. 253), and 16 to 19, under assignment 35 (R. 254), should have been granted. In the charge to the jury it was error for the judge to have refused Ohl's requests 63, 64, 68, 69, assignment 35 (R. 254).

Smith's claim that the contract gave him a warranty of *setting* capacity or any implied warranty of suitability for a particular use based on such *setting* capacity is inconsistent with the express warranty limited to a *bending* capacity (see Declaration, R. 230, Specifications 3 (d), R. 8, and 5, 6, R. 9 and the press Specifications, R. 47). Such a claim is something beyond in degree what the express warranty gave. It is like demanding 75 where an express warranty is limited to 50. It is plainly inconsistent with the express warranty. Where negatived, as here, by the express warranty of capacity, the alleged implied warranty of a greater capacity is not within the terms of the contract as properly construed under the Massachusetts Sales Act.

Mass. G.L. c. 106, sec. 17 (6).

Bird & Son v. *Guarantee Construction Co.,* 295 Fed. 451, 455.

"The express warranty of one or more of the qualities of an article excludes an implied warranty of the same qualities or of other qualities of a similar nature. The exclusion or acceptance in his contract by a purchaser of personal property on a warranty of one

or more qualities raises a conclusive presumption that he did not desire or could not secure, or that the parties thought he should not have the warranty of others of the same character and bars any implied warranty thereto."

Century Elec. Co. v. *Detroit Copper & R.R. Mills*, 264 Fed. 49, 53 (C.C.A. 8).

"And even more decisive upon the facts in this case, is the doctrine that an express warranty in the written agreement excludes an implied warranty concerning the same subject-matter. A guaranty set forth in the contract is the denial of a guaranty by implication. This principle is stated by Mechem as follows:

" 'Where the parties have expressly agreed upon a warranty, the law must, in the absence of fraud or mistake, conclusively presume that they have included in their express agreement whatever of warranty is to prevail between them respecting the matter to which it refers. An express warranty of quality, for example, must therefore exclude an implied warranty of quality.' 2 Mech. on Sales, § 1259; 2 Benj. on Sales § 1002.

" 'An express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use.' De Witt v. Berry, 134 U. S. 312, 10 Sup. Ct. 536, 33 L. Ed. 896.

" 'An express warranty of one of the qualities of a machine or article excludes implied warranties of other qualities of the article of a similar nature.' Reynolds v. General Electric Co., 141 Fed. 551, 73 C. C. A. 23."

Alderson v. *General Electric Co.*, 210 Fed. 775, 781.

DeWitt v. *Berry*, 134 U.S. 306, 312.

See also *Reynolds* v. *General Electric Co.*, 141 Fed. 551.

Smith seeks to bring himself within the decisions that where an intended purchaser makes known to the seller the purpose for which he requires an article and leaves to the seller the making or selection and furnishing of an article which is suitable to accomplish the designated purpose, there is a warranty that the article furnished will be suitable to accomplish that purpose.

Mass. G.L. c. 106, sec. 17 (1).

Such an instance was that of *Bird & Son* v. *Guarantee Construction Co.*, 295 Fed. 451, where the contract between the parties "was not a formal one in writing." Where it had to be gathered from "all correspondence and conversations that relate to the agreement between the parties."

In our case Smith did not merely ask Ohl to construct a machine capable of accomplishing certain results. The evidence shows plainly that Smith had originally seen one of the Ohl presses used in making risers and treads (R. 44) in a Cambridge concern which Smith was employing to make these shapes for it (R. 44). Smith saw one in operation in Brooklyn, New York, before it bought one of Ohl (R. 44).

Before placing the order Ohl had submitted specifications and blueprints (R. 45). These are Exhibit 14 (R. 47, S. 28-33). These had been examined both by Smith, the president and treasurer of the company, and its master mechanic, Hovasse (R. 50), both of whom were familiar with machinery and competent to understand and read specifications and blueprints (R. 52, 69).

In his testimony Smith, who placed the order in behalf of the Smith Company, definitely testified: "I had been studying the blueprints received with the November 9th letter for several months and I wanted the machine built as shown in those blueprints" (R. 52).

Smith contracted to buy from Ohl one of its standard machines as described in those specifications and blueprints.

It did not contract to have a machine selected or built to accomplish specified results irrespective of whether the machine corresponded to the identical article described in the contract. The distinction between two such propositions is the difference between the Bird case and ours, and is clearly pointed out in the discussion by Judge Sanborn in *Davis Calyx Drill Co.* v. *Mallary,* 137 Fed. 332, at 335.

(*b*)

Warranty of Perfection.

The Court further instructed the jury:

> "There is also an implied warranty as it is called that the machine would do perfect work" (R. 218).

There is no express warranty to that effect in the contract. It is not a usual implied warranty. It is not claimed in Smith's pleadings. The first mention of it in these terms or substance is in the judge's charge. Its introduction here not only violates the parole-evidence rule (*supra,* B, 3), but also the express provisions of the Sales Act, excluding inconsistent implied warranties.

Mass. G.L. c. 106, sec. 17 (6).

It introduced a novel warranty of "perfect work" into commercial law. This is plainly error.

Ohl's exceptions to the charge A, B, D, E, F, G, H and L (R. 221-222) should be sustained under assignment 36 (R. 255).

(6)

Claim Based on Insufficient Safety Devices.

Smith was allowed to go to the jury on a claim that the press lacked an efficient safety device. It is to be noted,

first, that Smith's specification makes no reference to a lack of any safety device (R. 8-10), and so precludes that claim (see *supra*, A).

Smith had called in two professors of the Massachusetts Institute of Technology to examine the machine (R. 93). In the course of their experimenting with the machine they caused it to break (R. 94). They submitted a report in writing in regard to the machine (R. 102). This report was to the effect that, while the press had a reasonable factor of safety, the break was caused through an *excessive* load in the operation of the press, the closing of the dies having been slightly in excess of *proper* clearance for the thickness of the metal to be bent (R. 105). They went on to report that the machine had no *efficient* safety device to operate when the machine was overloaded. In their opinion this was the most serious indictment against the *design* and construction of the machine; that friction clutches which were the safety devices which the press had (see R. 147, 148, 151, 155, 157, 169, 198) were undesirable (R. 105, 106).

Such a device is one to function when a machine, through accident or operator's negligence, is operated *beyond* its normal capacity, and has to do with the "design" of the press, not with the workmanship or materials used in the press, nor with the capacity itself. Townsend, the expert, so regarded it (R. 97, 105, Ex. 20). The contract specifying no particular type of safety device to the exclusion of another is like buying an automobile without specifying whether the brakes are to be mechanical or hydraulic. If a buyer contracts for an automobile—capacity 5-passenger, 70-horse-power, "material and workmanship . . . of the best"—and receives a 5-passenger 70-horse-power automobile with 4-wheel mechanical brakes, that buyer cannot claim he was entitled to one with hydraulic brakes and therefore an improper delivery has been made. The type of safety device, like the type of brakes, is a matter of design, and not of material, workmanship or capacity.

This claim of a particular type of safety device was not within the terms of the contract or its express warranty.

Smith and Hovasse inspected the press in Newark before shipment (R. 24, 25), and Smith had seen one in operation in Brooklyn (R. 45). The lack of the claimed safety device was apparent to a non-expert on inspection, as appears in the testimony of another of Smith's expert witnesses, Perkins (R. 112, 119).

There was no implied warranty that Smith was entitled to any safety device different from that which the press as designed actually had.

> "If the buyer has examined the goods there is no implied warranty as regards defects which such examination ought to have revealed."

Mass. G.L. c. 106, sec. 17 (3).
Rosenbush v. *Learned,* 242 Mass. 297, 301.
Cudahy Packing Co. v. *Narzisenfeld,* 3 F. (2d) 567, 570 (C.C.A. 2), and cases.
Barnard v. *Kellog,* 10 Wall. 383, 388.
W. & S. Job Co., Inc., v. *Heidritter Lumber Co.,* 255 Fed. 311 (C.C.A. 2).

The charge of the judge to the jury on this issue was wholly inadequate, misleading and erroneous.

> "Also, there is a disputed question whether a safety device of some kind was necessary and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted. Those are the questions of fact, gentlemen, in which you are the final judges" (R. 219).

Ohl's exception to the admission of testimony on this point under assignment 9 (R. 246, 96) should be sustained. Ohl's requests 21, 22, 23, 23-a, 24, under assignment 37 (R. 256) should have been granted, its exception J to the charge (R.

222, 219) should be sustained under assignment 38 (R. 256), and its requests 65, 66 and 67 (Assignment 40, R. 257) should have been given.

C.

NOTICE REQUIRED UNDER THE MASSACHUSETTS SALES ACT.

(1)

THE LAW APPLICABLE.

Although this contract uses lease language, it is a conditional sale, and the Massachusetts Sales Act applies.

Williston, Sales (2d ed.), sec. 7.
Mass. G.L. c. 106, sec. 3, (3).
Penser v. *Marsh*, 218 N.Y. 505.
In re Seward Dredging Co., 242 Fed. 225, 227 (C.C.A. 2).
Peoples Electric Railway v. *McKeen Motor Car Co.*, 214 Fed. 73 (C.C.A. 8).
Hurnanen v. *Nicksa*, 228 Mass. 346, 349, and cases.
Russell v. *Martin*, 232 Mass. 379, 382.
Gottsman v. *Jeffrey*, 268 Mass. 10, 12, 13.

(2)

MASSACHUSETTS SALES ACT REQUIREMENT.

The Massachusetts Sales Act provides:

> "But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise, or warranty, within a reasonable time after the buyer *knows* or ought to have known of such breach, the seller shall not be liable therefor."

Mass. G.L. c. 106, sec. 38.

The Sales Act of New Jersey has practically the same provision.

N.J. Comp. Stat. 1910, p. 4658.

A buyer's acceptance of the goods may not discharge the seller's liability in damages for breach of warranty, but the buyer's failure to give that seller notice of that breach of warranty within a reasonable time *after he knew* or *should have known of the breach* precludes the buyer's rights in recoupment or in an independent suit for a breach of warranty.

2 Williston, Sales (2d ed.), 1259, 1260.
Moore v. *Foss*, 18 F. (2d) 635 (Mass.).
Trimount Lumber Co. v. *Murdough*, 229 Mass. 254.
Skillings v. *Collins*, 224 Mass. 275.

It is not only what the buyer actually knew or ought to have known but also what it is held he could have found out by reasonable test or inspection.

Chess & Wymond Co. v. *LaCrosse Box Co.*, 173 Wisc. 382, 387.
Murphy v. *Gifford*, 228 Mich. 287, 296-297.
Moore v. *Foss & Co.*, 18 F. (2d) 635, 638 (C.C.A. 1).
Lowenberg Co. v. *Block*, 140 N.Y. S. 375.
Glenmore Woolen Mills v. *Goldberg*, 186 N.Y. S. 580.

"Prompt exercise of opportunity for inspection is therefore essential."

2 Williston, Sales (2d ed.), 1261, sec. 484 *a*.
Wright v. *General Carbonic Co.*, 271 Pa. 331.

(3)

WHAT THE NOTICE MUST CONTAIN.

To determine what the required notice from the buyer to the seller must contain, it may be well to ascertain the purpose of the notice. Strangely enough, there has been no authoritative consensus of opinion on this subject, and most decisions have assumed its necessity without discussion. Such a provision does not exist in the English Sales Act. It is a new commercial element in our Uniform Sales Acts and not a codification of general commercial law. Although Courts have not all explained its origin in the same way, yet, logically, business fair dealings between parties would seem to require that if the buyer has any fault to find he should report it promptly when the justice of the claim can be adequately investigated equally by both and, if reparable, unnecessary loss avoided. He should not wait until the seller has no reasonable opportunity to protect himself. Courts have given the following reasons for this rule as a basis for its interpretation.

Its purpose is to prevent the buyer from retaining the goods and using them without giving notice.

> *Regina Co.* v. *Gately Furniture Co.*, 154 N.Y. S. 888.

Quoting an early Wisconsin decision (*Boothby* v. *Scales*, 27 Wisc. 626, 638), the Arizona Court explains the reason for the requirement:

> "A buyer must promptly notify the seller of a breach of guaranty, so that seller will not be deprived of the use of his money or required to pay interest to the buyer and will not be deprived of opportunities for resale."

> *Pratt-Gilbert Co.* v. *Hildreth*, 24 Ariz. 141.

"A notice of rescission must be clear and unambiguous, conveying an unquestionable purpose to terminate the contract."

Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153, 158.

Its purpose is to give the seller an early notice of the alleged defects.

Maggioros v. *Edson*, 143 N.Y. S. 377.

Its purpose is to enable the seller to take such steps as may be necessary in the protection of his rights.

Tegin v. *Chapin*, 176 Wisc. 410, 416.

"The purpose of the provision requiring such a notice is clearly to give the seller timely information that the buyer proposes to look to him for damages for the breach, that the former may govern his conduct accordingly. Such notice need take no special form, but it must be such as fairly to appraise the seller of that intention."

Truslow & Fulle, Inc., v. *Diamond Bottling Corp.*, 112 Conn. at 187.

While the Circuit Court of Appeals for the Second Circuit says:

"The notice 'of a breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages,

as to which, rightly or wrongly, the law requires that he shall have early warning."

Am. Mfg. Co. v. *U.S. Shipping Board E. F. Corp.*, 7 F. (2d) 565, 566 (C.C.A. 2).

At any rate, all the decisions agree that compliance with this statutory requirement of notice is an absolute condition precedent to the buyer's right to recover for a breach of warranty either in recoupment or by independent action. The minimum requirements for the contents of such a notice must logically be a statement which shall advise the seller of:

1. The alleged defects.
2. Repel the inference of waiver.
3. A claim against the seller.

Moore v. *Foss*, 18 F. (2d) 635.
Nashua River Paper Co. v. *Lindsay*, 249 Mass. 365, 370.
Wildman Mfg. Co. v. *Davenport*, 147 Tenn. 551.
Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153.
Bodek & Son v. *Avrach*, 297 Pa. 225, 229.
See also *Bloch* v. *Eastern Machine Screw Corp.*, 281 Fed. 777 (C.C.A. 8).

"Without attempting to lay down a general rule of construction as to the substance of the notice of the breach of warranty which the buyer must give, after acceptance of the goods, in order to hold the seller liable, it seems clear that it must refer to particular sales, so far as that is practicable; that it must at least fairly advise the seller of the alleged defects, and that it must be such as to repel the inference of waiver. Although it need not necessarily take the form of an express claim for damages or threat of such, it ought

to be reasonably inferable therefrom that the buyer is asserting a violation of his legal rights."

Nashua River Paper Co. v. *Lindsay*, 249 Mass. 365, 370.

"For another reason the notice did not meet the requirements of the statute. The telephone conversation of July was not a notice that the blankets delivered were not in accordance with the contract. The only thing plaintiffs did was to ask defendants to go and look at the blankets. There was no assertion that there was anything wrong with them, or if it was it failed to state any particulars. Neither does the letter of August 1st state in what respect there was a failure to deliver in accordance with the contract. That letter merely informs defendants that plaintiffs propose to bring suit for breach of contract, without stating the nature of the breach."

Bodek & Son v. *Avrach*, 297 Pa. at 229.

In view of the general ruling of the judge about the notice, we say that Ohl's requests 35, 38, 50, 51 and 57 (Assignment 44, R. 259-260) should have been given.

Where the facts are not in dispute, the adequacy of the notice and of the reasonableness of the time of such notice are questions of law for the Court.

Schloss Bros. & Co. v. *Charles Stern Co.*, 36 F. (2d) 628, at 631.

Marmet Coal Co. v. *Peoples Coal Co.*, 226 Fed. 646, 651.

International Agriculture Corp. v. *Stadler*, 212 Fed. 378, 381, and cases cited.

Lincoln v. *Croll*, 248 Mass. 232, 233.

American Steam Gauge &c. Co. v. *Mechanics &c. Co.*, 214 Mass. 299, 301.

Tinius Olsen Test. Mach. Co. v. *Wolf Co.*, 297 Pa. 153.

Wildman Mfg. Co. v. *Davenport &c.*, 147 Tenn. 551, at 560, and cases cited.

See also *First National Bank* v. *Pipe &c. Co.*, 273 Fed. 105, 106 (6) (C.C.A. 2), and—

> "The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court, and was properly withdrawn from the consideration of the jury."

Earnshaw v. *United States*, 146 U.S. 60, at 67, and cases cited.

American Steam Gauge &c. Co. v. *Mechanics &c. Co.*, 214 Mass. 299, 301.

This is on the same principle established by this Court that—

> "when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding"—

it is the duty of the judge to direct a verdict.

Baltimore & Ohio R.R. Co. v. *Groeger*, 266 U.S. 521, 524.

While the judge correctly ruled that here these questions were questions of law for the Court, he incorrectly ruled that as a matter of law Smith complied with the statute (R. 218). We now propose to show that in this latter ruling he was in error, and that none of the notices given satisfied the statute, and that Ohl's requests under assignments 41 (R. 257) and 44 (R. 259) should have been given; that Ohl's exception under assignment 42 (R. 259) should be sustained; and that verdicts in each case should have been directed for Ohl (Assignments 28, 29, R. 252, 211).

(4)

NOTICES GIVEN.

All the notices except one relied upon were in writing, so there was no dispute as to what or when notices were given (Smith's specifications R. 9, #9, R. 10, #10, 11).

Time When Defects were First Known.

BY SMITH'S OWN DECLARATION AND SPECIFICATIONS AND THE TESTIMONY OFFERED BY IT ALL DEFECTS COMPLAINED OF WERE NOTICED FROM THE BEGINNING OF OPERATIONS OF THE MACHINE ON APRIL 15, 1926 (R. 231, last par.; R. 8, #2, 3; R. 56).

To test, therefore, whether the notices relied upon fulfilled the statutory requirements, let us see, first, what were the defects in the machine which Smith claimed breached the warranty, and secondly, what notices of them it gave Ohl and when the same were given.

What the Trouble Really Was.

There was a good deal of controverted testimony from both sides as to Smith's trouble with the machine and its causes. Ohl claimed that the trouble was caused by Smith's failure to assemble and to maintain the machine properly in his plant and to operate it with the required skill. The testimony on this subject was supplemented by evidence of experts.

After Smith had set up the machine in Chelsea, the first time the press was operated, on April 15th, the bronze bushing in the housing connected with the flywheel shaft turned in the housing so that the press could not be operated (R. 61, 72, 80). Smith continued to use the press without complaint until June 25th, when it submitted a complaint of "trouble as the flywheel bearing and disc get very hot" (R. 9, #9*a*; R. 30, Ex. CC). This complaint did not correctly

describe the trouble, as it was the flywheel shaft bearing that was involved in the trouble (R. 74, 80, 82), and not the flywheel bearing, as Ohl understood from Smith's notice (R. 92, Ex. KKK; R. 33, Ex. FF). Ohl replied that it was a simple matter to clean out the flywheel roller bearings and grease the machine—any ordinary mechanic can do so (R. 31, Ex. DD). The complaints then for the time being were dropped.

Smith claimed that the heating trouble continued, the bearings became hot (R. 55, 85, 88, 89, 108) and trouble was indicated from the beginning in April (R. 72-73, 87); that the press was repaired (R. 72), but the use of it continued uninterruptedly.

After three months' operation (July 12th) Smith determined to see if it could use the press for punching holes as well as bending metal (R. 49), and consulted Professor Norton of the Department of Mechanical Engineering of Harvard, to work out some plan for a gang punch (R. 98, Ex. 19).

August 13th Smith refused further payment and claimed the press did not render satisfactory service (R. 31, Ex. EE). The notice did not advise Ohl in what way the press did not comply with the contract, and did not mention any of the complaints now complained of by Smith in its specifications (R. 8) or in its testimony.

August 16th Ohl sent to his Boston attorney, Shannon, Smith's letters and instructed him to have a first-class mechanic examine the flywheel bearing, the one mistakenly complained of by Smith (R. 92, Ex. KKK). Shannon had the Boston Engineering Company call on Smith (R. 91, 92). Its men took down the clutch assembly for examination and noticed brass and oil in it and an accumulation of paste of oil and dust and brass filings (R. 84). In doing this they broke a part called the brake pulley, through removing it improperly (R. 76). They later brought it back to Smith, and Hovasse repaired the assembly (R. 76).

August 23d (R. 10, #9c) Smith complained that "the principal difficulty" was that the press "will not bend 3/8" metal without a material deflection so that when we do succeed in bending a given piece of 3/8" it requires a lot of man power after each operation to recover the metal from deflection" (R. 35, Ex. II). The notice specifies 3/8" metal as that about which complaint was made, although in fact no 3/8" metal had been used in that press since Ohl bent 3/8" metal as a test in Hovasse's presence in Newark before the machine was shipped (R. 65, 79, 88). This was the first notice by Smith of any "bowing."

The material on which these machines work is not uniform, variations existing among sheets of the same lot and gauge, as well as in different parts of the same sheet. The variations are in thickness and in comparative hardness and softness, elasticity, tensity or springiness (R. 57-58, 68, 79, 110, 129, 143, 144, 152). Such variance in the material was admitted to be a factor in producing lack of uniformity in the product bent. This is referred to in this case as "bowing" (R. 9, #6; R. 15, 63, 65, 103, 143, 152). This admitted variance in commercial soft steel is important in connection with Smith's claim that the press was defective because its products bowed (R. 8, #3*d*; R. 9, #5, 6; R. 10, #11*b*).

This "bowing" also had been observed by Smith "from the very beginning" (see *infra*, "The Third Alleged Notice," (*a*), p. 65).

To obviate the bowing in Smith's product Hovasse attempted experiments (R. 76-77). He put wedges under the bed of the press and ran babbitt metal under its bed (R. 77). Before he did so there had been a clearance between the bed of the press and its foundation (R. 77), as called for by Ohl's plans and specifications (R. 83). This clearance, in a proper operation of the press, should be kept clear (R. 89) as an additional safety factor in case the machine was not properly operated or adjusted (R. 148, 151, 155). When it was found that this idea of Hovasse did

not work (R. 76), Professors Swett and Townsend, from Technology, were called in. They went over the plant and examined the press and saw a piece of ⅛" stock bent which showed a decided bow (R. 93).

On October 15th they returned to take measurements, and, while experimenting with the press, broke the left stanchion of the press (R. 94), and on November 22d made a written report covering their observations (R. 102, Ex. 20). In this report these gentlemen, acting as disinterested experts, reported first that on short lengths of light material there was a lack of alignment or bowing though not of sufficient magnitude to interfere seriously (R. 103-104). On heavy material, and with long lengths of all thicknesses, the bowing required straightening (R. 104). This bowing, these professors considered, was caused principally by a "poorly designed and weak die" (R. 104, 105-106) and through excessive movement of the bed with respect to the floor caused by "ill-advised arrangement of the heavy bedding under the center of the bed" (R. 106). This last referred to Hovasse's experiment (R. 77).

They reported the press had a reasonable factor of safety; that the break in the end frame, or stanchion, or housing, was caused through an *excessive* load in operation of the press, the closing of the dies having been slightly in excess of proper clearance for the thickness of the stock to be bent; that the machine had no *efficient* safety device to operate when the machine was overloaded, which in their opinion was the most serious indictment against the *design* and construction of the machine; that friction clutches as safety devices were undesirable (R. 105). They recommended that the broken stanchion be repaired by welding (R. 102, 106).

While Professor Swett, as one of the experts, adhered to this report, the other expert, Mr. Townsend, the instructor under Professor Swett (R. 125), was retained by Smith as

an expert witness to make further studies, and later repudiated all of this report that was favorable to Ohl (R. 94-95, 100).

Smith then had repaired the broken stanchion by use of steel yokes and 3″ bolts by November 25, 1926 (R. 109). In December of 1926 Smith repaired the hammer-adjusting clutch (R. 64), which he alleged had given trouble from the beginning (R. 8, #3c; R. 87). After those repairs it gave no further trouble. During the whole period Smith kept and used the machine (R. 68, 87) without visible difficulty (R. 139) and with no trouble with the products except bowing (R. 81, 87).

Townsend, as Smith's expert, claimed that the press broke because it did not have sufficient capacity, and did not have a sufficient factor of safety (R. 94, 107, 110, 111, 120).

At no time was the machine tested on such a 3″ die as was described in the specifications and warranty, although it had been tested on 2¼″ die (R. 100, 116). It was uncontroverted that bending metal with a 3″ die was a different proposition than doing it with a 2¼″ die (R. 91, 100, 138, 140). It takes nearly double the pressure to bend on a 2¼″ die than on a 3″ die (R. 150).

Smith offered testimony that the press could not BEND and SET ⅜″ metal. It was admitted that it took greater force to SET the metal than to BEND it (R. 107, 82, 183; see 138-139, 142). Ohl claimed that it had the capacity to BEND ⅜″ metal required by the contract.

Turning now to its notices. Smith now claims on seven occasions it gave notices to Ohl.

The First Alleged Notice.

The first notice of June 25, 1926, was clearly of no effect (R. 9, #9, Ex. CC, R. 30). It was admittedly a mistake (R. 74, 80, 82). The Court so ruled (R. 83).

It complained that "the fly wheel bearings and disc got very hot" (Ex. CC, R. 30).

> "XQ. 63—Now is it a fact that the fly wheel bearings and disc were giving trouble at that time? A. That is a mistake, an error.
>
> "XQ. 66—There was no basis for any complaint about the heating or getting very hot, of the fly wheel bearings and disc? A. That is right."
>
> Cross-examination of Hovasse, Smith's master mechanic (R. 74).

But even were it based on facts, it was wholly lacking in all that such a notice should contain. By no stretch of construction can this letter be read as a claim of breach of warranty.

Ohl's requests 36, 37, assignment 44 (R. 259), as well as his requests 25, 26, 27, and 62, assignment 39 (R. 256), should have been given.

As to this notice the Court, after the witness three times admitted that the letter was in error (R. 74, 80, and 82), subject to Ohl's exception, admitted testimony to show that Ohl must have understood the actual defect intended to have been reported in the letter (R. 83). Then, in Ohl's cross-examination of this witness, the Court refused to permit identification of the location of the complaint involved on the ground that the notice was in error (R. 83). To meet the evidence admitted under the first ruling Mr. Ohl was asked concerning his understanding of the letter and the question was excluded (R. 150). This notice was one within the Court's ruling that as a matter of law notice was given within a reasonable time (R. 218, Assignment 42, 259, 222 C).

Ohl's exceptions to the admission of the testimony on Record 82 and to the exclusion of testimony on Record 83 and

150, under assignments 3, 4 (R. 244) and 21 (R. 250), should be sustained.

The Second Alleged Notice.

This was dated August 13, 1926 (R. 9, #9B, R. 31, Ex. EE). This was one hundred and twenty days—practically four months—after the press had been in operation in Smith's shop and these troubles actually observed.

See Smith's Specifications, R. 8.

This notice complained that the press "cannot accomplish what the specifications call for."

While the law does not undertake to prescribe by days specific limits within which a notice is within a reasonable time, reasonableness being always a question of degree, yet there are certain lapses of time which no one would dispute as falling beyond the limit of "reasonable."

A buyer in Chelsea, his seller in Newark, New Jersey, with telephone, telegraph, and mail service available, can have no excuse for not notifying the seller within a few days of his actual experience of observed defects. Nor can he have any excuse for continuing without complaint his use of the press for practically four months while continually experiencing trouble.

The previous complaint of June 25th had been promptly answered within three days of its being written, and while Ohl's answer treated the complaint as trivial, it made definite suggestions for improvement (Ex. DD, R. 31). When more than forty-seven days were allowed to elapse without any further word, Ohl had a right to believe the trouble was eliminated.

Courts have decided as a matter of law that less, or at least no greater, delay was fatal to the buyer's rights under the statute.

23 days—*Kauffman* v. *Levy,* 169 N.Y. S. 454, 455.

26 days—*Silverman* v. *Engel*, 211 N.Y. S. 584.
[1]27 days—*Lincoln* v. *Croll*, 248 Mass. at 237.
57 days—*Tegin* v. *Chapin*, 176 Wis. 410, 416.
[2]31 days—*Tinius Olsen Test. Mach. Co.* v. *Wolf Co.*, 297 Pa. 153.
3½ mos.—*Bodek & Son* v. *Avrach*, 297 Pa. 225.
4 mos.—*Am. Mfg. Co.* v. *U.S. Shipping Board E. F. Corp.*, 7 F. (2d) 565, 566 (C.C.A. 2).

The cases upon which our opponent relies concern instances relating to a period of time within which it is held that a buyer could or could not have learned the facts requiring a notice, and not to what is a reasonable delay after actual knowledge. Here the delay concerns notice after actual knowledge, and under Massachusetts law, holding a 27-day delay unreasonable (*Lincoln* v. *Croll*, 248 Mass. at 237), bars Smith's recovery either in recoupment or independent action.

In the next place, the notice itself is deficient. It simply complains "it cannot accomplish what the specifications call for," that there were "deficiencies of the press" (R. 32).

Requests 28, 29, 30, 33, 34, 39 to 49, 52 to 55, 58 to 60, under assignment 41 (R. 257), should have been given, and Ohl's exception C to the charge (R. 222)—"A notice was given within a reasonable time" (R. 218)—should, under assignment 42 (R. 259), be sustained.

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[1] "The delivery of these cones at the New York warehouse of the plaintiffs, through the congestion of traffic was delayed until January 7, 1920. The plaintiffs on February 13, 1920, in a letter gave notice to the defendant for the first time that the 'yarn did not fulfill the specifications of our contract' and asked to be reimbursed for the loss. It is too plain for serious discussion, having regard to the situation of the plaintiffs, and in the light of all the circumstances, that the delay of the plaintiffs in giving notice to the defendant was entirely without business or legal excuse and was as matter of law a bar to the action."

[2] "When plaintiff's engineer demonstrated the machine on August 31, 1926, defendant then knew that this warranty had failed, and the machine would not indicate the amount of unbalance without calculation and use of a chart. It waited a month before giving notice. The lower court held this was an unreasonable time, and we concur in its conclusion. If defendant wanted to rescind, it should have acted promptly. The vendor was entitled to this knowledge, as a matter of business, and the breach was one that was immediately discoverable" (at 158).

A general letter of criticism is insufficient notice. The letter here falls very short of advising the seller of the alleged defects, which is under our law the minimum requirement for the notice required under sec. 38 of our Sales Act.

Nashua River Paper Co. v. *Lindsay,* 249 Mass. at 370.

Wildman Mfg. Co. v. *Davenport,* 147 Tenn. at 560.

See also *Bloch* v. *Eastern Machine Screw Corp.,* 281 Fed. 777 (C.C.A. 6).

Requests 35 and 38, assignment 44 (R. 259), should have been given.

The Third Alleged Notice.

Ex. I I (R. 35), of August 23, 1926 (R. 9, #9c), refers to two difficulties—bowing and the clutch.

(*a*) *Bowing.* This notice claims "the chief difficulty" is that the machine will not bend ⅜" metal without a material deflection (R. 35, 36).

Hovasse, the master mechanic, and Carron, the operator, of this press say that up to this date no attempt had been made to bend any ⅜" material (R. 65, 79, 88). The widest die used was 2¼" to bend ¼" metal (R. 54, and Ex. 18, 80).

Hovasse in February at Newark had a piece of ¼" stock bent on this press. It came from the press bowed (R. 69, 82). From April 15th on Smith had every opportunity to test this press in all desired ways. If, as Smith claims, the press should have had capacity to set as well as bend this metal without bowing, and it did not have that capacity, then Smith knew of the bowing defect in the February product. Directly after the press was ready on April 15th, with every opportunity for experimentation, it was Smith's duty to test its capacity to bend metal. Such tests would have disclosed whether or not it did have the required capacity.

The time for giving the buyer's notice does not commence only when the buyer "knows" of the defect, but when he "*ought to know*" of it. As a reasonable man, put on his guard by notice, he should in the way of ordinary business perform such tests, make such experiments, and do such things as early as his opportunity offered and when business vigilance required.

As we have already pointed out, the buyer is both required to inspect and test promptly and is held to have immediate knowledge of all that such inspection and tests would reasonably disclose.

Smith had been using this press since April 15th (R. 8, #2; R. 54, 61, 71, 84), making risers and treads (R. 54, 88). In bending these 6′ risers the bowing or deflection was especially noticeable when bent in the center of the press, but not so much so when bent at the end of the machine (R. 63). This bowing refers to the product of the machine (R. 15, 63).

THIS ALLEGED DEFECT WAS ADMITTEDLY OBSERVED FROM THE BEGINNING OF OPERATIONS ON APRIL 15TH (R. 8, #2, #3d; R. 9, #5, 6).

This notice was SIX MONTHS after the first bowing in products from this press was observed in Newark and over FOUR MONTHS after Smith had been experiencing such bowing in its own operation of the press.

As to the bowing defect, the notice was not within the time requirements of the statute.

(*b*) This letter also refers to "What is known as the clutch which was removed by some men that you sent to our factory the other day." In Ohl's opinion here was the only difficulty (R. 35). On June 25th Smith wrote Ohl (Ex. CC, R. 30). Ohl answered on June 28th (Ex. DD, R. 31). Smith delayed any further communication until August 13th (Ex. EE, R. 31). Ohl then had been notified only that "the fly-

wheel bearing and disk get very hot," and on August 16th answered Smith's August 13th letter on that basis (R. 33, Ex. FF). On the same day he wrote his Boston counsel, Mr. Shannon, sending him copies of these four letters (R. 92, Ex. KKK), asking for certain investigation as to this "fly-wheel bearing." Shannon called on the Boston Engineering Company to make that investigation. They did, and in doing so took down "the clutch assembly" (R. 83). It was this part of the press where trouble started on April 15th, when the 16" bearing turned in the shaft, the press kept heating up, and the flywheel bearing was shooting brass (R. 61, 76, 72, 84, 85, 87). With all this trouble observed on April 15th a notice of it four months later, in August, could not be ruled as a matter of law a sufficient notice (R. 35, Ex. I I) given within a reasonable time.

The Fourth Alleged Notice.

Smith's August 25th letter (Ex. JJ, R. 37) is specified as the fourth notice (R. 9, #9d). It specifies the 16" bushing "a poor loose fit" (R. 37). Hovasse, who wrote the letter, testified this bearing in which the clutch assembly shaft revolves was the 16" bearing which turned in the housing (R. 61) on April 15th and gave continued trouble after that (R. 62, 73, 86, 88, 89) until Smith repaired it the following September (R. 76, 86). So this notice also was more than four months after the actual trouble was observed, concerned only a minor item and was repaired and eliminated from the case by being repaired a few days after this letter.

The Fifth and Sixth Alleged Notices.

Smith specifies the fifth notice was on September 1, 1926 (R. 9, #9, 10). According to the evidence, however, Smith told Ohl's representative Kolarsi on September 1st of this 16" bearing and the broken part in the clutch assembly (R. 66) that the Boston Engineering Company broke, and told

him the stringers were not bent straight (R. 66). All of this had been covered in the two preceding notices, and nothing new is included in this notice.

The sixth notice on September 3d (Ex. MM, R. 40) (R. 10, #9f), adds nothing to the preceding four. What has just been said applies to these two notices equally well.

The Seventh Alleged Notice (R. 102, Ex. 20).

No seventh notice is specified (R. 8, 10). Smith is therefore precluded from claiming it as a notice.

If, as we contend, the machine had that "safety device" to which under the contract Smith was entitled (*supra*, B (6)), there is nothing in this notice indicating that either the "bowing" or the "break" was due to any defect in the machine as originally delivered to and accepted by Smith. Rather does this report and that of Professor Norton (R. 98) establish that in the opinions of Professor Norton of Harvard and Professors Swett and Mr. Townsend of Technology, as disinterested, non-partisan experts, the machine had the capacity the contract called for and a sufficient factor of safety, but that the Hovasse experiment and Smith's continued operation without sufficient clearance between the dies caused the break and that the "construction of the female portion of the die" caused the bowing.

Moreover, the evidence shows that on November 22d (R. 106) the "professors" reported to Ohl's then counsel Sanderson and Smith's counsel *in care of Smith's counsel* their observations of the press and its alleged shortcomings (R. 102). The evidence does not show when after its date Smith's counsel gave that report to Ohl. The break in the stanchion occurred on October 15th (R. 93). The report is dated some five weeks afterwards. With so serious an alleged defect, the surrounding circumstances required immediate notice to Ohl, and did not from any viewpoint justify a delay in excess of five weeks for any notice.

CONCLUSION UNDER C.

We submit that as a matter of law Smith failed to give Ohl that notice which under the Massachusetts Sales Act is a condition precedent to any liability of Ohl to Smith for any breach of any warranty under this contract, and that Ohl therefore becomes entitled to a directed verdict in its favor in each case (Assignments 28, 29, R. 252, 211).

D.

OHL AS PLAINTIFF WAS ENTITLED TO A DIRECTED VERDICT, OR, IN THE ALTERNATIVE, TO HAVE THE COURT REQUIRE SMITH TO ELECT HIS REMEDY.

(1)

DIRECTED VERDICT.

On November 17, 1927, Ohl sued Smith on its promissory notes (R. 2). On December 7th Smith sued Ohl (R. 230). On February 29, 1928, Smith pleaded a general denial, want and failure of consideration (R. 3).

Had Smith in that action intended to claim recoupment damages for *partial* failure of consideration based on breach of warranty, damages as a *pro tanto* defense to the notes, it was obliged so to plead that claim.

> "Total failure may always be pleaded and shown in defense; *partial failure, only* when ascertained and liquidated, unless offered as evidence in reduction of damages, under the rule which permits such defense in certain cases, *when it is properly pleaded,* to avoid circuity of action."
>
> *Hodgkins* v. *Moulton,* 100 Mass. 309, 310, 311.

> "*A partial failure of consideration must be specially pleaded.* Inasmuch as that issue was not open under the pleadings, the instruction requested was properly

refused, and the defendant's exception must be overruled. Under R. L. c. 73, §45, 'partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.' By statute *such a failure* is made a matter of defence as against any person not a holder in due course, and the burden of proof thereof is upon the defendant, who *must set it up in his answer in case he wishes to rely upon it.* R. L. c. 73, §45. McCormack v. Williams, 88 N.J. L. 170. The common law rule was the same. Hodgkins v. Moulton, 100 Mass. 309, 310. Shoe & Leather National Bank v. Wood, 142 Mass. 563. Such a defence is analogous to that of recoupment, *which must be specially pleaded.* Davis v. Bean, 114 Mass. 358. Wentworth v. Dows, 117 Mass. 14. Sayles v. Quinn, 196 Mass. 492."

Indiana Flooring Co. v. *Samuel Rudnick,* 236 Mass. 90, 92, 93.

Farmers State Bank &c. v. *Parr,* 234 Ill. App. 78, 87, and cases.

Smith did not so plead, but elected to claim its damages in its own cross-action. On March 20th it entered its case and filed its declaration on that basis (R. 230 *et seq.*). At the trial the writs and pleadings in each case having been read to the Court and jury, Ohl made out its *prima facie* case by introducing the notes and rested (R. 11). Smith then "opened his case" and introduced its evidence (R. 11 *et seq.*). The trial proceeded on the issues raised in Smith's case and was "treated all along as if there were only one" case (Judge's charge, R. 220, lines 5, 6). Uncontroverted evidence established beyond dispute that Smith had elected not to rescind the contract, but to retain the machine the contract called for (Charge, R. 220, lines 15-16), and seek damages for breach of warranty.

"If the facts were as alleged, in the second action, the defendant in the first action, on discovering the breach of the warranty, might avail himself of his rights in either of three ways: He might rescind the contract, return the property and recover back the money that he had paid, Bryant v. Isburgh, 13 Gray, 507; he might set up the breach of the warranty as a defence, in whole or in part, to the claim for compensation in the first action; or he might pay the claim and bring an action for his damages. Hunt v. Brown, 146 Mass. 253, 255. Riley v. Hale, 158 Mass. 240, 246. Gilmore v. Williams, 162 Mass. 351. He elected to answer only a general denial to the action for compensation, and he brought his action for damages for the breach of the warranty. That left the first action unaffected by this claim for damages, inasmuch as there was no attempt to set them up in recoupment."

Cox v. *Wiley*, 183 Mass. 410, 412.
The John Service, Inc., v. *Goodnow*, 242 Mass. 594, 598.
See *Truslow & Fulle, Inc.*, v. *The Diamond Bottling Co.*, 112 Conn. 181, at 186.

Smith followed the same course as "the defendant" in the above case, pleaded general denial, want and failure of consideration, but in no way pleaded the *pro tanto* defense open to him under the Negotiable Instruments Law or the recoupment defense open to him at common law and under the Sales Act.

Smith, however, now makes the same claim as did that "defendant."

"It is contended that the findings in the municipal court must have been in accordance with the direction of the trial judge in Cook v. Castner, 9 Cush. 266, referred to in Star Glass Co. v. Morey, 108 Mass. 570,

573. But in that case the damages were pleaded in recoupment of the first action, and were sued for in a second action. The cases were tried together, and the claimant of damages, instead of electing the suit in which he would have his damages assessed, preferred to claim them in both, and the jury were permitted to consider them in answer to the first suit, and then to consider whether they were more than enough to meet the claim of the plaintiff in that suit, and to allow the surplus, if any, to the plaintiff in the second suit. It was held that no injustice was done by this method, and the exception to it was overruled. Perhaps it would have been better practice to compel the claimant to elect. But in the present case the pleadings would not allow this method of trial in the municipal court, and we must assume that no damages for a breach of the warranty were considered in the first suit."

Cox v. *Wiley,* 183 Mass. 410, 413.

There being no specific denial or call for proof of Smith's signatures to the notes (Mass. G.L. c. 231, sec. 29), the notes sued on being "deemed prima facie to have been issud for a valuable consideration" (Mass. G.L. c. 107, sec. 47), Smith's uncontroverted evidence establishing original consideration, no total failure of consideration, no rescission and its own retention of the goods, there was no jury issue left in *Ohl* v. *Smith,* and on Ohl's motion, therefore, it was the Court's duty to direct a verdict for Ohl.

Baltimore & Ohio R.R. Co. v. *Groeger, Admx.,*
266 U.S. 521, 524.
Assignment 28 (R. 211, 252).
Request #8, 9, Assignment 32 (R. 212, 252).

(2)

BUYER'S ELECTION OF REMEDIES.

The trial court, however, in its denial of Ohl's motion for a verdict in its suit, improperly treated Smith's breach of warranty claim as a *pro tanto* defense based on a partial failure of consideration. On that basis the Sales Act imposes on Smith the obligation to elect between such *pro tanto* defense and its affirmative cross-action claims. Certain of Ohl's requests which the Court refused were directed to that point.

Mass. G.L. c. 106, sec. 58, (1), *a, b,* (2).

At common law partial failure of consideration, based on a claim for breach of warranty, could be a *pro tanto* defense —a recoupment—in a suit on a purchase note.

> "It is well settled in his Commonwealth that where a note is given for goods sold under such circumstances as give the buyer the right to rescind the contract, if the buyer rescinds, the note is avoided as between him and the seller; but if the buyer does not rescind, and allows the contract to stand, the seller can recover upon the note subject to the right of the buyer to reduce the amount as though the action were brought on the contract of sale. And this rule is applicable whether the right to rescind is based upon the fraudulent conduct of the seller or otherwise. In other words, the buyer may rescind or not. If he rescinds, the note in the hands of the seller is avoided. If he does not rescind, but avails himself of the contract, then the seller may recover upon the note subject to a deduction which ought to be made from the plaintiff's demand, as though the action were upon the contract of sale. Harrington v. Stratton, 22 Pick. 510. Perley v. Balch, 23 Pick. 283, 286."
>
> *Daniel* v. *Learned,* 188 Mass. 294, at 296.

Under the Negotiable Instruments Law that defense is still available by statute.

Mass. G.L. c. 107, sec. 51.
Jones v. *Revere Preserving Co.,* 247 Mass. 225, 227.

Whether this defense of partial failure of consideration is called "recoupment," as in *Wentworth* v. *Dowes,* 117 Mass. 14, 15, or "a defense pro tanto" as in the Negotiable Instruments Law, it is the right which the Sales Act and the common law called recoupment.

Mass. G.L. c. 106, sec. 58, (1), (*a*).
See 57 C.J. 358, sec. 1, defining recoupment.

This right of recoupment for breach of warranty or an independent action for breach of warranty under the Sales Act, as well as at common law, are mutually exclusive.

Gilmore v. *Williams,* 162 Mass. 351, 352.
Mass. G.L. c. 106, sec. 58, (1), *a, b,* (2).

Where both remedies, however, are sought, as here, in cross-actions, the ancient practice allowed the complicated process of dealing with the buyer's rights with special instructions as to buyer's damages: If the jury find the buyer's damages due to breach of warranty equal or exceed the unpaid purchase price, then the jury find for the buyer in the seller's suit and for the buyer for the excess of such damages in the buyer's suit. If the jury find such damages are less than the purchase price unpaid, then they find for the seller in the buyer's suit and for the seller in the seller's suit for the deficiency of buyer's damages under the unpaid purchase price.

Cook v. *Castner,* 9 Cush. 266, 277.
Star Glass v. *Morey,* 108 Mass. 570, 573.

That old practice was condemned in, and apparently abandoned after, the decision in *Cox* v. *Wiley,* 183 Mass. 410, 413, and modern practice, to avoid jury confusion resulting from this procedure, requires the buyer to elect between his remedies at the close of the evidence.

Mark v. *Stuart-Howland Co.,* 226 Mass. 35, 43.

Had the rule under the old practice been followed, the mistaken verdicts (R. 226) would have been unlikely; and had the modern practice been observed, they would have been impossible.

The judge, having refused to require an election, left this issue in an entirely confused state to the jury. He told them: *"The Smith Company keeps the machine. The Smith Company has not said that the dies were improper"* (R. 220). He then leaves them in a position where they are told they can give Smith the machines and dies, return to him his money, and damages in addition. In effect the Court gave Smith the benefit of the rescission so far as liability is concerned and enforcement of the contract so far as its obligations thereunder are concerned.

Ohl's requests 2, 3, 4, 5 and 6 under assignment 30 (R. 252), 9a under assignment 31 (R. 252), and 7, 8, and 9 under assignment 32 (R. 252) should have been given, its exceptions to the Court's refusal should be sustained and Ohl's exceptions under assignments 26 and 27 (R. 251) to the Court's refusal to require Smith to elect its remedies should be sustained.

E.

DAMAGES.

(1)

Market Value.

For breach of warranty of quality the buyer's damage ordinarily is the difference between the value of the goods

at the time of delivery and the value they would have had if answering to the warranty.

Mass. G.L. c. 106, sec. 58 (7).

Moss v. *Sherburne,* 11 F. (2d) 579, 582 (C.C.A. 1).

National Wholesale Grocery Co. v. *Mann,* 251 Mass. 238, 250.

The press was delivered on March 15, 1926 (R. 60). It was used from April 15th (R. 61) until it was broken by Smith on October 15th (R. 93, 94). After that break was repaired the press was used continuously to the time of trial (R. 81). Trouble had been experienced with the press, repairs made, changes made, and experiments attempted by Smith. The case was given to the jury on May 7, 1929 (R. 4), over three years after delivery of the press.

The Court, however, applying this rule of damages in one place, instructed the jury to consider the worth of this press "in its present condition" (May, 1929), in another, "before it was broken—before it broke" (October, 1926) (Assignment 48, R. 261, 220). Not only is the charge confusingly inconsistent in applying the October, 1926, date and the May, 1929, date, but is on either basis inaccurate. The time of delivery which the statute specifies as the essential date was in March, 1926 (R. 60).

Ohl's exceptions M, N, P (R. 222, 220) under assignment 48 (R. 261) should be sustained.

(2)

CONSEQUENTIAL DAMAGES—REPAIRS.

We do not contend that repairs may not, under G.L. c. 106, sec. 58, (6), (7), in certain cases be a proper element of damages. We contend, however, that where the Court has instructed on the market value basis the cost of repairs *per se*

are not as matter of law to be added to the market value damage without qualification.

Assume the value of the goods in conformance with the contract is $10,000. Assume the value as delivered is $8000. The buyer's damages under the market value rule is $2000.

Assume that by repairs costing $2000 the buyer puts the goods in the condition the contract called for. Then the buyer's actual damage is $2000, and no more. Under the instructions in this case (R. 220, 221), however, that second $2000 repair item is added to the first $2000 depreciated market value item to make the buyer's damage $4000 instead of the $2000 to which he is entitled. Thus the buyer finally gets a $10,000 machine at a net cost to him of $6000, which, on the basis of value found, was worth $8000 when received.

The Court gave Smith damages for the money equivalent of the defects in the press, together with the amount of the expenditure necessary to correct these defects in the press when delivered. Such instructions allowed Smith to duplicate damages.

Under the correct rule such damages are the amount in dollars and cents which the value of the press as delivered fell short of the value which it would have had if in accordance with the contract plus the cost of reasonable repairs less the enhancement in value through those repairs.

See *Moulton* v. *McOwen,* 103 Mass. 587, 591, 598.

Ohl's exceptions O and Q (R. 223) under assignment 49 (R. 261) should be sustained.

(3)

THE VERDICTS UNDER THE EVIDENCE AND INSTRUCTIONS.

(I)

Assume on the evidence most favorable to Smith the rule of *Cook* v. *Castner* (*supra,* D (2)) had been applied.

The only evidence of value of the press, if in accordance with the contract, is in Exhibit D (S. 1) $10,300. Assuming Smith's figure of its value when delivered was $2500 (R. 115), there is a difference of $7800. Smith spent for repairs $673.44, $1858.31, or $2531.75 (R. 109). Assuming those repairs in no way enhanced that $2500 delivery value, Smith's total damages became $10,331.75. The balance Ohl sued for is $6504. This leaves an excess damage of $3827.75, which, under the *Cook* v. *Castner* rule and on this evidence and assumption, was the maximum verdict to which Smith could have been entitled.

(II)

The Court ruled Smith made no complaint about the dies (R. 220), and confined its damage instruction to the press or machine (R. 218-221).

The dies had a value of (Ex. 17, S. 34)	$1,214.68
The value of the press on delivery was (R. 115)	2,500.00
Giving a total value on the evidence and instructions of	$3,714.68
Smith paid Ohl $4963 (R. 220) and spent for repairs $2531.75 (R. 109), making his total cost	$7,494.75
Deduct the above value of	3,714.68
And we have an actual damage under instructions and evidence most favorable to Smith of	$3,780.07

This figure is further reduced when the motor, about which there was no complaint, valued at $310 (S. 1, Ex. D), is considered and is further reducible to the extent that the $2531.75 repairs corrected deficiencies in the press when delivered increasing the $2500 delivery value.

The $7500 verdict is again seen inconsistent with the evidence most favorable to Smith and with the instructions.

(III)

The Court in the Smith case instructed the jury: "So with the Smith Company having paid nearly $5,000 and having spent nearly $2,500 you will find what the machine is worth and if it *is* worth less than the $5,000 they paid you may find a verdict for the difference for the Smith Company and in addition to that you may add to it the amount which they spent for repairs in the neighborhood of $2,500" (R. 221).

Under those instructions the verdict was	$7500
Deduct the repairs figure of	2500
and we have as Smith's damage, in addition to the repair costs	$5000
Deduct what on these instructions Smith paid	$5000
and we have as a value of the press which the Court instructed the jury to find	Nothing

Yet Smith's own evidence admitted a $2500 value (R. 115) for the press, which, together with the dies and motor, had sufficient value so that Smith kept, used and doubtless still is using them.

(IV)

These verdicts permit Smith to keep the press, dies, and motor without paying a cent for them. Smith paid Ohl $4963 (R. 220); spent on repairs $2531.75 (R. 109), a total of $7494.75. The Ohl verdict excuses Smith from paying the balance due Ohl. The Smith $7500 verdict repays Smith all he has paid and spent, so that under these verdicts Smith keeps the press, dies, and motor, for all of which it pays nothing at all.

(V)

The foreman in substance said the jury's intention was to apply the $6504 note balance against the $7500 verdict (R.

226). Doing so would leave roughly $1000 in Smith's favor. The evidence most favorable to Smith is consistent with that intention and result. The press value when delivered was $2500 (R. 115). The dies and motor, not complained of, were worth $1500 (S. 34, Ex. 17; S. 1, Ex. D), a total value of $4000. Smith had paid Ohl $5000 (R. 220), or $1000 more than, on this evidence, the value Smith received. Hence the set-off the jury intended was logical and the verdicts they intended consistent with the evidence, considering their intention to find generally in Smith's favor. The verdicts they rendered were illogical and inconsistent.

F.

EXCEPTIONS BASED ON ADMISSION AND EXCLUSION OF EVIDENCE.

(1)

Test Bars from Broken Stanchion.

As we have already explained, when the Tech professors attempted, on October 15, tests on the press they broke one of its stanchions. Smith injected into the case a claim of defective material in the machine.

Perkins, one of Smith's expert witnesses, testified that in his opinion the break in the stanchions was due to crystallization and metal fatigue (R. 113). Townsend's report showed the press, through faulty operation, "had weakened in a vital spot" (R. 105). In Smith's cross-examination of Ohl's foundryman, Davis, a witness called in rebuttal, Exhibits OOO, 1, 2, 3 and 4 had been introduced (R. 134).

They were four pieces of metal originally comprising two test bars made according to the specifications shown in Exhibit RRR, figure 2 (see R. 255, #11, and Ex. RR, S. 21). On the promise of Smith's attorney to show that these test bars came from this press (R. 208) the Court admitted evidence as to the tensile strength of these bars (R. 208,

209) without proof or offer of proof as to when they were taken from the press—before or after this crystallization—or as to the place in the stanchion from which they were taken with respect to the break in the stanchion. It later appeared that both these test bars were taken during trial and from the broken stanchion at a point "just below the fractures" (R. 205), and that the one taken from the place nearest the fracture showed 1200 pounds per square inch less tensile strength than the one taken a little further away (R. 210).

Ohl's objections to the admission of testimony based upon these tests should have been sustained and its exceptions under assignments 24 and 25 should be sustained (R. 208, 209, 251).

Anticipating, from Smith's cross-examination of Ohl's foundryman, Davis (X-Q. 21, R. 134), that Smith would offer such testimony, Ohl in redirect asked Davis whether or not stressing metal to a point of metal fatigue would affect the tensile strength of the metal (Q. 26, Q. 27, R. 135). These questions the Court excluded, and Ohl's exceptions to their exclusion under assignment 19 (R. 249, 135) should be sustained.

(2)

FOUNDRY GUARANTY.

It was immaterial whether Ohl's foundry guaranteed to Ohl the tensile strength and the endurance of the housing in this case (R. 132, 133). No such aspect had been opened by Ohl with this witness or others. The testimony was prejudicial to Ohl in the inference that, because the foundry did not guarantee these castings to Ohl, the housings were not what the contract called for. Ohl's exception (R. 133) under assignment 18 (R. 249) should be sustained.

(3)

OPINION EVIDENCE—OMITTING AN ESSENTIAL.

It was uncontroverted that greater force is required to bend on a 2¼" than on a 3" die (R. 91, 100, 138, 140, 150). Ohl's warranty specified a capacity to bend on the basis of a *3" die* (Ex. A, R. 11). Yet the Court, subject to Ohl's exceptions, admitted evidence as to bending ⅜" stock without any die being specified (R. 245; Assignment 7, R. 91).

The largest die Smith had was "supposed to be 2¼" but measured 2 5/16" (R. 79), was ordered for ¼" stock maximum (R. 54, Ex. 18; R. 12, Ex. A, last die specified), and the witness being examined had never bent over ¼" stock on it (R. 88). Yet the Court admitted opinion testimony through this witness to show the press could not bend ⅜" stock on that same 2¼" die (R. 91, 246, Assignment 8). Like testimony was again admitted based on a 2¼" die (R. 111, 246, Assignment 11).

Later the Court admitted testimony as to the actual capacity of this press based on computations without any evidence as to the die used in those computations (R. 112, 247, Assignment 12). On cross-examination of this witness it appeared that in making these computations the witness had used a 2¼" die (R. 116).

Ohl's exceptions under assignments 7, 8, 11 and 12 should be sustained (R. 245, 246, 247).

(4)

UNITED STATES GOVERNMENT METAL SPECIFICATIONS WERE ERRONEOUSLY ADMITTED.

This contract in no way referred to any specifications of quality or kind of material to be used except that the material was to be "of the best" (Ex. A, R. 11). To prove, however, that Ohl was obligated to deliver a press with castings testing to a particular standard, Smith offered and the

Court admitted, subject to Ohl's exception, United States Army Ordinance Department Metal Specifications (R. 205, Ex. RRR, S. 21-26, Assignment 23, R. 251). There was no evidence to show or claim made that such specifications were so universally adopted and recognized in the trade as to make them competent evidence of a trade custom. Specifications used commercially were later shown to be quite different (Ex. 32, R. 207; S. 36, 37), requiring a tension test for heavy castings of 24,000 pounds (S. 37, par. 6), as compared with the Army requirement of 30,000 pounds (S. 22, Table 2).

These Army specifications were not only incompetent but their admission was highly prejudicial to Ohl. Ohl's exception to their admission (R. 205; Assignment 23, R. 251) should be sustained.

G.

ADDITIONAL EXCEPTIONS TO THE CHARGE AND REFUSALS TO CHARGE.

(1)

ASSIGNMENTS 45 AND 46 (R. 257).

It appeared through the Smith testimony that, before the press broke, Smith's master mechanic, Hovasse, had experienced trouble with the press, had made repairs and had "experimented" by installing sub-supports under the bed of the press to counteract bowing (R. 77). It also appeared that this experiment was designated as a cause of alleged defects of the press observed in October by Smith's consulting engineers (R. 104, Q. 2; R. 106, Q. 4).

Inasmuch as the Court did not anywhere cover this point in the charge, on this uncontradicted evidence from Smith's witnesses Ohl was entitled to its 61st request, that "Ohl is not responsible for a damage to the machine resulting from the defective sub-support criticised in Ex. 20" (R. 260, Assignment 45).

Smith's evidence showed defects and repairs as well as this experiment before the break. The engineers' report showed as an adequate cause of the break the improper operation of the press in the past through application of an excessive load, which "eventually caused the rupture" (R. 105, Q. 3). This aspect the Court ignored in its charge, and instructed the jury to determine whether or not at the time the press broke it was being properly operated (R. 219, 260, Assignment 46).

Ohl's exceptions under assignments 45 and 46 (R. 260) should be sustained.

(2)

THE INADEQUACY OF THE CHARGE.

"A magistrate presiding over a jury trial ought himself to state in his charge comprehensively, plainly and forcibly all the governing principles of law as to the issues raised by the pleadings supported by the evidence so that the jury may clearly understand their duty and be enabled to perform it intelligently."

Maxwell v. *Massachusetts Title Insurance Co.*, 206 Mass. 197, 200.

"This duty is not affected by the absence of specific requests by counsel, and, where attention is properly directed to the omission and it is not remedied, an exception may be sustained if necessary to render substantial justice."

Mahoney v. *Gooch*, 246 Mass. 567, 571.

These instructions should be full and accurate, touching upon every point involved—

Williams v. *Winthrop*, 213 Mass. 581, 583—

to enable the jury to arrive at an intelligent and just verdict.

Sawyer v. *Worcester Consolidated Street Railway Co.*, 231 Mass. 215, at 218.

In such a charge "a party is entitled to something more than the absence of unsound statements of law in a charge; he is entitled to clear and accurate and helpful instructions on the points which it touches."

Mahoney v. *Boston Elevated Railway Co.*, 271 Mass. 274, 280.

In the instant cases, which consumed eleven trial days, with complex fact issues involved, with many, but well-defined, law principles to be applied, with Ohl's 76 requests for rulings (R. 211-218) to be dealt with, the charge in these cases, taking about ten or fifteen minutes, is meagre to the point of legal insufficiency (R. 218-221).

Its most glaring omissions caused mistaken verdicts. The charge in no way instructed the jury as to its verdict in the Ohl case in the event the jury found the press was not what the contract called for. After the verdicts were rendered the jury foreman said that the jury intended by their verdicts to have Ohl's unpaid purchase price notes applied against Smith's damages assessed at $7500 (R. 226), a difference of $6500 against Ohl between what the jury intended and what their verdicts accomplished.

The Court charged that Smith made no complaint about the dies (R. 220) which were priced at over $1200 (S. 34, Ex. 17). The obligation to pay for the motor, priced over $300 (S. 1, Ex. D) was not contested. These two items made a total of over $1500. The charge, however, omitted consideration of these items, and in instructing the jury confined itself to the press and its value.

The Court ruled: "The Smith Company keeps the machine" (R. 220), and yet failed to give the jury any instruc-

tions as to the effect of such action on its part and the liability for payment of the purchase price.

As discussed under "damages," the charge also ignored even the possibility of enhancement in value to the press through repairs, and left the cost of repairs as an independent unqualified element of damages.

Ohl's exceptions R, S, T, and W (R. 223) under assignments 50, 51, 52, and 53 (R. 261) should be sustained.

H.

EXCEPTION TO CONDUCT OF JURORS.

One of the jurors during the trial was observed making notes, and another juror during a recess was seen taking measurements of exhibits. During the trial the attention of the judge was called to this and he was asked to instruct the jury in reference thereto. He refused to instruct the jury that such conduct was improper, and allowed it to continue (R. 210). This again was brought up as one of the grounds relied upon on the motions for a new trial (R. 5, 236).

The measurements of the articles measured by the juror were testified to by the experts who had used scientific instruments for that purpose. The juror's rule may have been accurate and his ability to measure may have been excellent —again, the opposite may be true. Such private measurements by a juror during a trial are not proper.

Ewer's Admr. v. *National Imp. Co.,* 63 Fed. 562.

It is not known what the juror on these various occasions was writing. If it was something not connected with the case, then his inattention was improper. If it was something to do with the case, then such conduct was improper.

> "It was well calculated to divert the attention of the jurors, while they were busy, pencil or pen in hand, from the evidence, as it would naturally be progressing while

such notes were being made. The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given; unless a different course be consented to by the parties or the Court. . . . the jury should not be allowed to take evidence with them to their room except in their memory. It can make no difference whether the notes are written by a juror or by someone else. Jurors would be apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts."

Cheek v. *State*, 35 Ind. 492.

Ohl's exceptions (R. 210) under assignment 55 (R. 261) should be sustained.

I.

OHL'S MOTIONS FOR NEW TRIAL.

In each case Ohl seasonably filed a motion for a new trial (R. 5, 236), which was overruled (R. 6, 237) and its bills of exception thereto filed and allowed (R. 226, 239).

Each motion was based on the same eight grounds, three concerning conduct of the jury. The remaining five concerned the verdicts fixing Smith's damage as excessive, against the evidence, the weight of the evidence, the law and the evidence, and the law.

The jury had rendered mistaken verdicts. They intended Ohl's unpaid notes in the suit to be credited against the Smith $7500 verdict (R. 226). That fact, disclosed to Ohl's counsel by the jury foreman, might not have compelled the allowance of the motions if the judge found that the amounts of the verdict as rendered were justified (see E (3), *supra*). The verdicts resulted, however, in transferring the

plaintiff's property to the defendant and gave him a bonus out of the plaintiff's pocket in addition.

The explanation for the mistake is found in the Court's inadequate instructions.

The jury's verdicts were against the evidence in its aspect most favorable to Smith (E (3), *supra*). The Court in each case should have granted Ohl's motion for a new trial, and Ohl's exceptions under assignment 54 should be sustained (R. 261, 5, 6, 226, 236, 237, 239).

J.

CONCLUSION.*

Ohl sued Smith November 17, 1927 (R. 2). Smith set up a general denial, want and failure of consideration, but did not plead recoupment or partial failure as a *pro tanto* defense (R. 3). On the facts and law of these cases that failure to plead that defense established Smith's election to assert its rights in its own suit, limited Smith thereto and entitled Ohl to a directed verdict in the Ohl suit (*supra*, D (1)).

Assuming the trial court properly treated Smith's claim of a breach of warranty as part of its answer in the Ohl case and thus a *pro tanto* defense, even though not pleaded, then the Sales Act applies. Smith having retained the machine, dies, motor and accessories under the act is limited to one of two alternatives:

> (*a*) ". . . set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the purchase price."
>
> (*b*) ". . . maintain an action against the seller for damages for such breach."
>
> Mass. G.L. c. 106, sec. 58 (1) (*a*) (*b*).

* The following is based on the pleadings, Smith's specifications and uncontroverted evidence making it the duty of the trial court to have directed verdicts.

Baltimore & Ohio R.R. Co. v. *Groeger*, 266 U.S. 521, 524.

The act also provides, however, that—

> "When the buyer has claimed and has been granted a remedy in any one of these cases no other remedy shall thereafter be granted."

Mass. G.L. c. 106, sec. 58 (2).

Smith, on this assumption, having first asserted its rights as a *pro tanto* defense to Ohl's suit, and having pursued those rights therein to judgment, Ohl became entitled as a matter of right to a judgment in Smith's cross-action.

If Smith as buyer failed to give notice as required by the Sales Act, Ohl as a matter of right is not liable to Smith for any damages, or Smith to any recoupment in defense to the notes.

Mass. G.L. c. 106, sec. 38.

Ohl seasonably in each case moved for a directed verdict (R. 4, 236), and seasonably excepted to the Court's refusals to grant the same (R. 211; Assignments 28 and 29, R. 252).

We submit that this Court in each case should reverse the judgment of the Circuit Court of Appeals and of the District Court and, as all facts pertinent to election and notice are uncontroverted, should order the District Court to enter judgment in *Ohl* v. *Smith,* No. 228, for Ohl for $6504, principal, and in No. 229, *Smith* v. *Ohl,* judgment for the defendant, or, in the alternative, as a minimum that Ohl's exceptions should be sustained in both cases and the same remanded for further proceedings to the trial court.

Respectfully submitted,

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